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PERSONAL MOBILITY RIGHTS IN THE EEC

University — Université
ALBERTA

Degree for which thesis was presented — Grade pour lequel cette thèse fut présentée
LL.M.

Year this degree conferred — Année d'obtention de ce grade
1984

Name of Supervisor — Nom du directeur de thèse
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PERSONAL MOBILITY RIGHTS IN THE EEC

by

Ⓒ PHILIP MARC RAWORTH

A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE
OF LL.M.

FACULTY OF LAW

EDMONTON, ALBERTA

SPRING, 1984

THE UNIVERSITY OF ALBERTA

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Supervisor

T. Christian

Date 30 Nov. 83

To Elaine, Kristin and James

ABSTRACT

This thesis aims at presenting a comprehensive statement of the personal mobility rights existing under Community law in the European Economic Community.

The introductory first chapter commences with a definition of the concept of personal mobility and a discussion of the economic nature of this concept within the European Economic Community. It goes on to discuss the various sources of Community law in this area and the scheme of the Treaty provisions relating to personal mobility rights. It concludes with a general analysis of the protection afforded to fundamental rights by Community law.

The second, third and fourth chapters contain a detailed account of the various separate rights that make up personal mobility. All include sections on the relevant legislation, the substance of the right in question and the scope of its application. Chapter Two deals with the rights of entry and residence, which together constitute the necessary first step towards personal mobility. Both require that the non-national be placed on the same footing as nationals and both involve a discussion of the work connection that is set down by Community law as a prerequisite to their exercise. The chapter also contains sections on corporate recognition, which is equivalent to entry and residence for natural persons, and the use of the public policy and health exceptions, the application of which has been restricted under Community law to these two rights. Chapter Three is devoted to the right to pursue a livelihood. The diverse restrictions that can be placed on the exercise of this right by non-nationals are analysed, and there is also a discussion of the various

Community harmonising mechanisms, which are intended to help non-nationals comply with national laws of general application that would otherwise prevent them pursuing their livelihood in other member states. The chapter concludes with a section on the exception based on employment in the public service and the exercise of official authority. Chapter Four has the broadest scope of all, as it is concerned with the many different facets of the non-national's right to equality in his host state. These comprise the rights of the migrant himself, including his right to special social security arrangements, and the rights of his family. All three of these chapters consider the question of nationality and the position of non-E.E.C. employees of E.E.C. employers under the Treaty.

The concluding chapter attempts to summarise the basic elements of the Community law on personal mobility and to evaluate its strengths, weaknesses and practical effect.

PREFATORY NOTE

The system of citing cases in this study is as follows. Cases that have come before the Court of Justice of the Communities are cited in the text of the thesis by an abbreviated name followed in brackets by the number assigned to them by the Court. This number consists of the case number and the year in which it was first brought within the jurisdiction of the Court - e.g. 32/76. Cases that have been decided by national courts are also cited by an abbreviated name followed in brackets by the name of the member state concerned. Full citations for all cases referred to in this study are given in a list following the Table of Contents. Community cases are cited in numerical order within successive years; national cases are cited in alphabetical order for each separate member state concerned.

During research on this study only the Common Market Law Reports (C.M.L.R.) were readily available to me, and in most instances this is the version of the case that was used. Subsequently it became possible to check this version against that contained in the European Court Reports (E.C.R.) and to supplement any gaps in the C.M.L.R. series. In the list of cases at the front of the thesis the report cited first is the one that was used primarily.

Community legislation is cited in the text of the thesis only by number without reference to its title. In the case of regulations the number of the legislation is followed by the year in which it was issued - e.g. 1612/68; the number of directives, by contrast, comes after the year in which they were issued - e.g. 68/360. All Community legislation referred to in the thesis is cited in detail in a list following the

Table of Contents or, in the case of the directives on self-employed activities, in the Appendix.

References to the Treaty provisions are based on the Sweet and Maxwell edition of the Treaty Establishing the European Economic Community, which contains the official English version and is the most accessible. The Convention on Mutual Recognition of Companies proved diddicult to locate and reliance had to be placed on the unofficial English translation in the CCH Common Market Reports.

ACKNOWLEDGEMENTS

My thanks go first to my supervisor, University Professor Dr. L.C. Green, for his advice, time and infinite patience; and to the Government of Canada for their financial assistance in the form of a Duff-Rinfret Scholarship.

I should also like to record my gratitude for the encouragement I received from many of my colleagues at the Faculty of Law at the University of Ottawa, in particular Professors Joseph Magnet and Walter Tarnopolsky (as he then was).

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Council Directive 64/225 - see under Insurance in Appendix.

Council Directive 64/427 - see under Manufacturing and Processing in Appendix.

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Council Directive 67/42 - *see* under *Real Estate* in Appendix.

Council Directive 67/530 - *see* under *Agriculture and Horticulture* in Appendix.

Council Directive 67/532 - *see* under *Agriculture and Horticulture* in Appendix.

Council Directive 67/654 - *see* under *Forestry and Logging* in Appendix.

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The following study is based on the legislation of the Community as of 31 December 1982.

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CHAPTER ONE

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Chapter 1

INTRODUCTION

THE CONCEPT OF PERSONAL MOBILITY

A Definition

Personal mobility is the ability to move freely between different jurisdictions and to reside, permanently or temporarily, in whichever one chooses. This ability may exist within one sovereign state with respect to its constituent provinces or states, or on an international level between a group of sovereign states.

The basic rights of personal mobility - those without which movement cannot even begin - are the rights of entry into and residence in another jurisdiction. To these must be added the right to pursue a livelihood, for, with the exception of tourists, students, retired people and the independently wealthy, a person who goes to another jurisdiction will need to be able to earn his living in order to remain. Finally, there is the right to equal treatment, which assures the migrant the same rights and benefits under the laws of the host jurisdiction as those enjoyed by persons already there. If the first three rights are the pillars upon which personal mobility is founded, the right to equal treatment is the cement that holds them up; there are few people who would consider moving to another jurisdiction for any extended period of time without a guarantee of continued access to the social amenities that form an indispensable part of modern life.

What these personal mobility rights entail in practice is the abolition of all discrimination against outsiders. As far as entry and residence are concerned, this can be achieved quite simply by treating them in the same way as those who are subject to the jurisdiction. When it comes to the right to earn a livelihood or the right to equal treatment, the situation is more complex, for, in addition to laws that openly discriminate against outsiders, there are also laws of general application which, because of the criteria upon which they are based, lead in fact to the same result. This latter type of discrimination, which is normally called discrimination in fact, will not be eradicated merely by treating the outsider on an equal footing with those subject to the jurisdiction as this means that he must still conform to the general laws that discriminate against him.[1] It will be necessary to go further and modify the criteria upon which these laws are based.

It is important to distinguish discriminatory general laws from those that may deter personal mobility but which either affect all persons in like manner or can be objectively justified. The high taxation rates in a particular jurisdiction may discourage immigration, but they do not place outsiders at any particular disadvantage. A requirement that an outsider possess the qualifications of the host jurisdiction, on the other hand, does disadvantage him, but, if it can be justified as necessary to maintain standards and protect the public welfare, it cannot be considered discriminatory.[2] Nevertheless, because such laws present obstacles to free movement, they will have to be harmonised if complete mobility is to be achieved. Such harmonisation is easier in the case of laws that serve some public goal than for those which result from national economic and social priorities, for in the latter instance it will first be essential to formulate common policies. However, where the achievement of personal mobility is part of a wider scheme of economic integration, as in the European Economic Community, there will often be an attempt to do this.[3]

Types of Personal Mobility

There are two types of personal mobility depending on the goal that it is intended to serve. If personal mobility is to be used to express and consolidate the political unity of a particular area, it is the free movement of persons in the abstract that assumes paramount importance. This entails complete freedom of entry and residence throughout the jurisdictions making up the political unit with less attention being paid to the right to pursue a livelihood. The right to equal treatment will reflect the political perspective of free movement by emphasizing civic and political rights rather than the social and other benefits that normally derive from employment. Where, on the other hand, personal mobility is part of a process of economic integration between different jurisdictions and so serves purely economic ends, the free movement of persons has only a functional importance. What is required is that people be able to export their labour and carry on their self-employed activities in accordance with the dictates of economic forces and free of any jurisdictional barriers. Thus the right to pursue a livelihood becomes paramount, and the right to equal treatment will concern, above all, continued access to those amenities such as social insurance, minimum wage legislation, job security and fiscal concessions that are related to employment. The rights of entry and residence will exist only to the extent necessary to permit the free movement of labour and business activities; in other words, they will be based on a work connection.

Political and economic personal mobility will exist together only in a unitary state, which is both an economic and political unit. In a federal state, political personal mobility will usually accompany and underline the political unity of the nation, but the degree of economic free movement will depend on the level of economic integration between the constituent parts of the federation. Canada, for example, has historically been less economically integrated than the United States with the result that there have existed more obstacles to the pursuit of a livelihood in another province and to access to its social benefits than are permitted between the states of its southern neighbour.[4] In the case of international economic integration, such as the European Economic Community and the Caribbean Community, to name but two of the many regional economic arrangements, the very basis of the associations ensures a regime of solely economic personal mobility. The scope of the right to pursue a livelihood in such associations will, however, differ according to the extent of the integration involved. In the E.E.C. Treaty, which aims at the very least at establishing a common market between the Member States, there is provision for a general free movement of labour and business activities, whereas the Treaty establishing the Caribbean Community, which remains essentially a free trade area, allows only for a very rudimentary right of establishment for self-employed persons and commercial undertakings. Political personal mobility on an international level will, of course, follow from any development towards political unity among the various regional economic groupings, but, as yet, such developments have not occurred.

Personal Mobility in the E.E.C.

The language of the personal mobility provisions of the Treaty of Rome contained in Articles 48 to 66 seems to tie freedom of movement to a very narrow view of economic activity. A worker may only move where he already has an offer of employment in another Member State,[5] and the self-employed are permitted free movement only in order to permit them to establish themselves[6] or to provide services abroad.[7] There are apparently no mobility rights for the unemployed, for persons wishing to investigate the possibility of setting up a foreign establishment or to travel in order to obtain contracts for their services, or for recipients of services. However, in its secondary legislation on personal mobility, issued pursuant to the Treaty, the Council of the European Communities has chosen to interpret these provisions more broadly in the light of the social objectives of the Treaty as set out in the Preamble and Article 2, which call for the improvement of living and working conditions within the Community.[8] Accordingly, a certain freedom of movement is extended to those looking for work[9] or seeking out business opportunities[10] in other Member States as well as to persons who wish to travel abroad to receive services.[11] In addition, anyone who is covered by a social security scheme of a Member State that relates coverage in some way to employment or self-employment may benefit from the Community rules on social security, regardless of whether or not that person invokes them for purposes connected with employment in another Member State.[12]

The Court has consistently supported the Council's approach. There are frequent references in its decisions on personal mobility to the underlying objectives of the Community,[13] which the Court agrees are "to ensure social progress and seek the constant improvement of the living and working conditions of...[the] peoples [of the Member States]...."[14] More specifically, the Court has upheld the broader application that the Council has given to the personal mobility rights enshrined in the Treaty. In a relatively early decision in Unger (75/63), the Court took the view that mobility rights do not accrue exclusively to persons "holding a job at that very moment,"[15] which vindicates the Council's extension of free movement to those in search of employment and business opportunities. Later, in Royer (48/75), the Court expressly refers to the right to look for work in another Member State.[16] In Watson and Belmann (118/75) it appears tacitly to share Advocate-General Trabucchi's acceptance in principle of the free movement of recipients of services. Finally, in a series of decisions[17] on the scope of application of Regulation 3 setting out the Community's social security rules, the forerunner of the present Regulation 1408/71, the Court found nothing in the Treaty provisions to indicate that the rules may only apply to migrant workers. Thus, a worker is covered by the rules while only on holiday in another Member State[18] even where he has always worked in only one Member State throughout his entire life.[19]

It is important not to exaggerate the role of the Court and the Council in freeing the concept of personal mobility from the very strict confines placed upon it by the Treaty provisions in Articles 48 to 66. There is no support in either the legislation or the jurisprudence of the Community for the view of some scholars that complete freedom of entry and residence is required by the Treaty in order to realize the political union that they claim is set out as a goal in the Preamble and Article 2.[20] Personal mobility may not predicated on employment under the Council's legislation, but it still remains work-related; the migrant must leave if he does not find employment[21] or decides against setting up a business establishment in the host state,[22] and the provider and recipient of services may remain in another Member State only as long as is required for their performance.[23] The Court has been equally insistent on the economic basis of personal mobility within the Community and has consistently interpreted the general objectives of the Community in purely economic terms. When it was asked, for example, to rule on whether the activities of football players come within the scope of personal mobility as defined by the Treaty, it declared that "having regard to the objectives of the Community, the practice of sport is subject to Community law *in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty*."[24] The attempt by Wyatt and Dashwood to find support for their claim for political personal mobility within the Community in the Court's decision in *Fracas* (7/75) and *Maison Singer* (44/65) is unconvincing.[25] Indeed the two cases are further evidence that the Court takes the opposite view. Although it is possible to question the Court's contention in *Maison Singer* that the extension of the Community's special social security arrangements to non-migrant workers derives from the need to establish "as complete a freedom of workers' movement as possible,"[26] the approach nevertheless indicates that the Court is not departing from its insistance on an economic basis for personal mobility rights within the E.E.C. Besides, the granting of social security coverage to tourists under the Community rules does not confer upon them any rights with respect to entry and residence, which are the crux of political personal mobility. As far as the *Fracas* decision is concerned, the Court's view that social security benefits must accrue to the handicapped child of a non-national[27] resident and continue even after he reaches his majority is based on its conception of the migrant worker's right to equal treatment in the host state, which, as the Court points out, falls squarely within the confines of economic personal mobility:

> Indeed, if this were not the case, a worker anxious to ensure to his child the lasting enjoyment of the benefits necessitated by his condition as a handicapped person, would be induced not to remain in the Member State where he has established himself and has found his employment, *which would run counter to the object sought to be attained by the principle of free movement of workers within the Community*....[28]

It may well happen that the E.E.C. does move towards the political unification of its Member States, in which case political personal mobility will become a necessary tool to consolidate the unity of the new super-state and the Treaty will have to be amended. In the meantime, however, the E.E.C. remains an area of purely economic integration with an appropriately economic concept of personal mobility. The Treaty at present admits of no other possibility.[29]

THE SOURCES OF COMMUNITY LAW

The Sources

Economic free movement within the E.E.C. is regulated by Community law. The main body of this law is contained in Articles 48 to 66 of the Treaty, the secondary legislation of the Council and the Commission made pursuant to the Treaty in the form of regulations or directives, and national legislation of the Member States passed at the behest of and in conformity with Community directives. There is also provision in the Treaty for the Council to adopt general programmes of action with respect to the abolition of restrictions on freedom of establishment[30] and on freedom to provide services,[31] and for the Member States to conclude conventions between themselves relating to the avoidance of double taxation and the mutual recognition of companies and firms.[32] The general programmes, however, are not binding law,[33] and there is no convention on taxation nor ratification of the one that was signed on mutual recognition of companies. A final source of Community law is the jurisprudence of the Court of Justice, which is given authority under the Treaty to interpret the Treaty and to review the legality of Community secondary legislation.[34]

Prior to the end of the transitional period, which lasted from January 1st, 1958 to December 31st, 1969, the relationship between the Treaty provisions and the secondary and national legislation was relatively straightforward. The Treaty set out the goals to be attained and guidelines on how this was to be achieved, while it was up to the Council and the Commission to bring about economic personal mobility within the Community by progressive stages directly by way of regulations and indirectly through national legislation passed in accordance with its directives. The only limitation placed upon the Community institutions was that their legislation should be consistent with the Treaty. Where this was not the case, the Court intervened to declare the inconsistent measures null and void.[35] After the end of the transitional period this relationship changes, for some of the Treaty provisions on personal mobility become directly applicable and acquire direct effect in the legal orders of the Member States. Community secondary legislation and national legislation based upon it are still important and continue to possess some autonomous value, but henceforth they exist side by side with the Treaty itself as the law of the Member States. In order to appreciate the significance of this development and properly to appreciate the nature of Community secondary legislation and its place within the various national legal orders, it is necessary to consider the concepts of direct applicability and direct effect.

Direct Applicability and Direct Effect

Some scholars refuse to make a distinction between these two terms. For them a Community measure can be described interchangeably as directly applicable or directly effective where it is automatically incorporated into the national legal order of the Member States without the need for any positive act of implementation so as to confer on individuals or entities rights that the national courts must enforce.[36] The other view, which is gaining more support, is that there are two different legal concepts involved here that call for the use of separate terms to describe them. Accordingly, critics who subscribe to this view use the term "direct applicability" exclusively to denote the process of automatic incorporation into national law and reserve the term "direct effect" for the susceptibility of a Community measure of direct enforcement by the national courts in favour of individuals.[37]

The second view is, it is suggested, considerably more logical. Furthermore, a distinction between the two concepts permits, as will be seen later, a more flexible attitude towards Community legislation, which accords with the practice of the Community institutions and the provisions of the Treaty. However, it is up to the Court of Justice to interpret the concepts of Community law, and therefore its pronouncements must be the final arbiter as to how these two terms should be used.

In a long series of decisions on the legal nature of various articles of the Treaty, the Court does seem to use the two terms interchangeably. In van Gend (26/62), the case that establishes the Court's approach, it held that "Article 12 of the E.E.C. Treaty has direct application within the territory of a Member State and enures [sic] the benefit of citizens whose individual rights the internal courts should protect."[38] The Court has maintained this approach even where the national court has distinguished between the two concepts in its reference.[39] Nevertheless, it cannot be said that the Court definitely favours this view, for in another series of cases it has taken the opposite approach.

The first of these cases is Grad (9/70), in which the Court was asked in a reference from the Munich Finanzgericht whether a Council decision providing for national implementation of a common turnover tax could, in the absence of such implementation, nevertheless confer rights on indivituals that national courts should enforce. Advocate-General Roemer, relying on the Court's pronouncements in the first series of cases, equated direct effect with direct applicability and concluded that, as the Council decision provided for national implementation and was not therefore directly applicable, it could not be invoked before the German court in support of an individual right.[40] The Court did not accept this reasoning. Instead it declared that, although regulations are directly applicable under Article 189 of the Treaty "and may therefore certainly produce direct effects by virtue of their nature as law," this does not mean that other instruments of Community secondary legislation that are not by their nature directly applicable "could never produce similar [direct] effects."[41] In other words, it is possible for a Community measure to be directly effective without being at the same time directly applicable. Thus the Court was prepared in principle to allow the plaintiff to invoke the decision directly before the Finanzgericht although it had not been automatically incorporated into German law. The Court has applied the same reasoning to give direct effect in the absence of direct applicability to the provisions of directives in such cases as van Duyn (41/74), Verbond (51/76) and Ratti (148/78). It is possible to conclude, therefore, that not only does the Court perceive a distinction between the concept of direct applicability and direct effect, it also envisages that the two concepts can exist independently of each other.

It is also possible to discern in the Court's decisions the different criteria that it sets out for establishing whether a Community measure is directly effective or directly applicable. Regulations alone are always directly applicable according to Article 189 of the Treaty by virtue of their very status, but Treaty provisions are also capable of direct application when the Court extends to them this quality. This it will do if the Treaty provision contains an obligation that is a) clear and precise, b) unconditional, and c) not subject to implementation by national legislation or Community measures.[42] But in order for a provision of the Treaty or of any instrument of Community secondary legislation to be directly effective, the Court only requires that it meet criteria a) and b). In Ratti (148/78), for example, where the plaintiff was attempting to base his legal rights on two Council directives that had not been enacted into Italian law, the Court stated categorically that "a national court requested by a person who has complied with the provisions of a directive not to apply a national provision incompatible with the directive not incorporated into the internal legal order of a defaulting Member State, must uphold that request if the obligation in question is unconditional and sufficiently precise."[43]

This difference in the criteria to be met by directly effective and directly applicable provisions is crucial, for it explains the apparent inconsistency in the Court's jurisprudence. In the first series of cases dealing exclusively with the direct applicability of various Treaty articles, the Court does not distinguish between the two concepts because it does not have to. A Treaty provision that meets the three criteria for direct applicability must necessarily be directly effective, as this latter quality requires the fulfillment of only the first two of these criteria. Thus it is understandable, although perhaps unfortunate, that the Court fuses the two concepts in its judgments. But the converse is not true; a directly effective provision, whether contained in the Treaty or in a secondary measure, will not automatically meet all three of the Court's criteria for direct applicability. Consequently, in the second series of cases, the Court is obliged to make the distinction.

Directly applicable Community provisions, whether in the form of Treaty provisions or regulations, will, of course, prevail within the national legal order over existing incompatible national laws.[44] The same holds true for directly effective provisions that lack direct applicability.[45] There is also an obligation on the Member States in each case to repeal or amend inconsistent national legislation, although the basis of the obligation differs. Because directly applicable Community law becomes part of the national legal order, the existence of other laws within the same order that conflict with it cannot be tolerated on account of the ambiguity and legal uncertainty that this creates.[46] In the case of directly effective provisions, the obligation arises from the requirement to enact the directive or decision into national law.[47] As far as consistent national legislation is concerned, there is no problem in either case; the requirement to enact the directive or decision into national law will already have been met, and in the case of directly applicable Community law the Court has no objection to compatible national laws existing side by side with it.[48] Inconsistent subsequent national legislation will be inapplicable in both cases[49] and possibly invalid in the face of directly applicable Community law.[50]

The Legal Nature of Regulations and Directives

Regulations. Regulations are laws enacted by the Council or Commission pursuant to the Treaty. They are directly applicable in all the Member States and render all inconsistent national law inapplicable, if not invalid. Not all the provisions of regulations are, however, directly effective. Article 36 of Regulation 1408/71, for example, which provides that a Member State that has paid out benefits in kind to a person covered by the social security scheme of another Member State can claim reimbursement from the competent state, can hardly be considered to confer a right on individuals susceptible of enforcement by national courts. Yet those scholars who refuse to distinguish between direct applicability and direct effect are forced to ignore this fact or to make the untenable assertion that it is not so. Some go as far as to claim that the provisions of a regulation that are not directly effective do not form a valid part of it.[51] Considering that the various administrative provisions necessary to make a regulation effective fall into this category, the claim is patently absurd.

The attitude of the Court has been to accept that all regulations are directly applicable by virtue of Article 189 of the Treaty and to assert that, in principle, this quality enables them to have direct effect.[52] But it has never indicated that such direct effect is an intrinsic quality of regulations in the same way as direct applicability. On the contrary, the Court's willingness to consider directives and decisions as capable of direct effect in the absence of direct applicability suggests a pre-disposition towards accepting the converse proposition in the case of regulations. Indeed, if one applies the criteria that the Court itself has set out for direct effectiveness,[53] administrative measures such as those contained in Article 36 of Regulation 1408/71 cannot possibly qualify, as they contain no clear and unconditional obligation emanating from the Member States towards individuals.

Directives. Directives are essentially instructions issued by the Council or Commission pursuant to the Treaty to all Member States requiring them to enact or modify national laws in accordance with the terms of the directive. No problems arise where these instructions are followed within the time limit set down in the directive, but there is some disagreement, not to say controversy, as to what happens if they are ignored or only partially followed. There are essentially three different views. The first is that taken by the French Counseil d'Etat, which denies that directives have any effect within the national legal order in the absence of their enactment into national law.[54] Then there is the view of those scholars who, because they do not distinguish between direct applicability and direct effect, claim that directives become directly applicable under such circumstances.[55] This approach is seriously flawed; it takes no account of Article 189 of the Treaty, which confines direct applicability to regulations in the case of Community secondary legislation, and it ignores the fact that directives cannot qualify either under the Court's criteria for direct applicability, as they are subject to national implementation. Some writers have attempted to overcome the first objection by asserting that directly applicable directives assume the status of regulations,[56] only to raise the new problem of legislative competence. If the Council or Commission can only act under the Treaty by way of directives, as is the case, for example, under Articles 54 and 63 in the field of personal mobility, they are presumably precluded from issuing regulations in the guise of directives. The second objection has been met by the suggestion that the failure of a Member State to implement a directive operates as a waiver of its right to do so.[57] But this idea runs counter to the jurisprudence of the Court, which has always looked at whether national implementation is provided for and not whether it has taken place or not. There would be little point in the Court's third criteria for determining direct applicability, if there is an implied waiver whenever it is not met.

The view that the Court adopts should already be obvious from the previous discussion, where reference was made to its decisions in van Duyn (41/74), Verbond (51/76) and Ratti (148/78). In these cases the Court was at pains to distinguish between direct effect and direct applicability and indicated that, provided that it meets the criteria of clarity and unconditionality, a provision of a directive can have direct effect without thereby becoming incorporated into national law.[58] Whether a provision sets out a clear enough obligation towards individuals on the part of the Member States depends on its wording. The quality of unconditionality may also depend on the wording, but more frequently it has to do with whether the time limit for national implementation has passed. In Ratti (148/78) this was not the case, so the Court held that the directives in question were not yet unconditional and could not be relied upon by the defendant before the national court. However, the Court added, "it follows that...at the end of the prescribed period...the directives...will be able to have... [direct] effects."[59] In the other two cases the time limit had elapsed, and, accordingly, the directives in question were to be given direct effect.[60]

In reaching these decisions the Court has also attempted to pre-empt criticism that it is undermining the scheme of Article 189. It has done this by insisting on the need to give directives direct effect in the absence of national implementation in order to preserve the binding quality that is conferred upon them by that article:

> It would be incompatible with the binding effect which Article 189 ascribes to directives to exclude on principle the possibility of the obligations imposed by them being relied on by persons concerned. Particularly in cases in which the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such an act would be weakened if persons were prevented from relying on it in legal proceedings and national courts prevented from taking it into consideration as an element of Community law. Consequently a Member State which has not adopted the implementary measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligation which the directive entails.[61]

The End of the Transitional Period and the Direct Applicability of the Treaty Provisions on Personal Mobility

By the end of the transitional period on January 1st, 1970, the free movement of workers had been achieved in essence by the Community secondary legislation. It therefore did not cause much of a stir when the Court held in France (167/73) that, in addition to Regulation 1612/68 on workers' free movement, Article 48 of the Treaty was also henceforth directly applicable in this area. In the areas of establishment and services, however, the Council had fallen behind in its programme of liberalisation and many activities were still subject to restrictions. One activity that had not been liberalized by Community secondary legislation was the legal profession. Consequently, a Dutchman, who held the degree of docteur en droit belge, was refused admission to the Belgian bar under a 1970 Royal Decree that discriminated against non-nationals. The Dutchman, Mr. Reyners, asserted that this decree was in contravention of Article 52 of the Treaty on freedom of establishment, which, he claimed, was directly applicable in the Member States as from the end of the transitional peri[illegible] The matter came before the Belgian Counseil d'Etat, which referred the issue of the direct applicability of Article 52 to the Court of Justice. Around the same time the Dutch lawyer of a certain Mr. van Binsbergen was refused permission under Dutch law to appear on his client's behalf before a Dutch court because he had transferred his residence to Belgium. Mr. van Binsbergen objected to the exclusion of his lawyer on the ground that it violated the freedom to provide services across national borders enshrined in Articles 59 and 60, paragraph 3 of the Treaty. The Centrale Raad van Beroep, before which the case ultimately came, requested the Court of Justice to rule on whether these articles, too, were directly applicable.

The Reyners (2/74) and van Binsbergen (33/74) decisions of the Court raised numerous eyebrows among scholars of Community law. On the basis of the criteria that the Court itself had set out for the direct applicability of Treaty provisions, it was thought by many that Articles 52, 59 and 60, paragraph 3 were not susceptible of direct application due to the provision in the Treaty for their implementation by way of Council directives and, ultimately, by national enactments. Nevertheless, in his submission to the Court in Reyners (2/74), Advocate-General Mayras rejected this contention.[62] He took the view that the implementary provisions were designed only as a "procedure whereby the gradual abolition of the restrictions was in principle to be carried out."[63] It was never intended, he argued, to subject the attainment of freedom of establishment to action by the Council once the deadline for achieving this "gradual abolition" of restrictions had passed, for the Council was obliged under Article 52 to have removed all restrictions by this time. To hold otherwise would be to enable the Council to evade its obligations. As the deadline had been reached at the end of the transitional period, the Advocate-General concluded that the obligation to permit freedom of establishment as defined in Article 52 was now absolute and directly applicable in all the Member States.

The Court adopted this reasoning in both Reyners (2/74) and van Binsbergen (33/74).[64] In its view the directives authorized by the Treaty were never envisaged as an indispensable means of implementing Articles 52, 59 and 60, paragraph 3 but rather as a way of providing a smooth transition to complete freedom of establishment and services during the period set aside for this purpose. The fact that the Council had not availed itself of this opportunity to the fullest possible extent could not alter the temporary nature of its mandate so as to prevent the Treaty provisions from assuming direct application at the end of the transitional period. The Court also noted that such an interpretation was in keeping with Article 8(7) of the Treaty, "according to which the expiry of the transitional period shall constitute the latest date by which all the rules laid down must enter into force and the measures required for establishing the Common Market must be implemented."[65]

The Court has frequently re-affirmed its decisions in Reyners (2/74) and van Binsbergen (33/74) in later cases dealing with Articles 52, 59 and 60, paragraph 3.[66] Strangely enough, it has never applied the same detailed reasoning contained in those cases to its decisions holding Article 48 to be directly applicable. In its reply to a reference on the direct applicability of Article 48 from the English High Court in van Duyn (41/74), for example, it answered merely that Article 48 "does not require the adoption of any further measures on the part either of the Community institutions or of the Member States"[67] and was thus directly applicable. In its earlier decision in France (167/73), referred to above, the Court did not give any words of explanation. Yet the same objection could be made with regard to the direct applicability of Article 48 as to that of Articles 52 etc., for Article 49 makes provision for the same programme of progressive measures. Presumably, therefore, the Court's reasoning in Reyners (2/74) and van Binsbergen (33/74) should also apply by default to Article 48.

As a reminder it should perhaps be pointed out in conclusion that all these articles are directly effective as well as directly applicable for they must, of necessity, set out clear and unconditional obligations in order for the Court to hold that they are directly applicable.

The Relationship between the Sources of Community Law after the End of the Transitional Period

However logical the Court's reasoning may be in Reyners (2/74) and van Binsbergen (33/74) and however welcome these decisions may be in terms of hastening the achievement of economic personal mobility within the E.E.C., the existence of directly applicable Treaty provisions alongside Community secondary legislation and national legislation enacted pursuant to it creates a confusing mosaic of law. It is necessary, therefore, to clarify the new relationship between the sources of Community law in the area of personal mobility.

In the first place it is essential to recognize the limited scope of Articles 48, 52 and 60, paragraph 3, all of which are concerned solely with the abolition of discrimination on the basis of nationality in law and in fact and do not affect national laws that do not so discriminate. It is not possible to use the Treaty provisions in order to challenge general laws that affect nationals and non-nationals in like manner or, more importantly, that place non-nationals at a disadvantage but which can be objectively justified. In Auer (136/78), for example, a veterinarian who was refused a licence to practice in France because the French authorities did not recognize his Italian qualifications as equivalent to the French diploma, was held to have no remedy on the basis of Article 52.[68] The requirement of a French diploma was considered by the Court of Justice to be objectively justified given the inferior standing of the Italian degree and hence not discriminatory.[69] By the same token, a non-national cannot rely on the Treaty if he wishes to contest the level of income tax that he must pay in the host state on the basis that it is higher than elsewhere and thus liable to dissuade him from remaining in that state. As all residents of the state must bear the same fiscal burden regardless of their nationality, there is no discrimination to bring the matter within the purview of the Treaty provisions.

This limitation in scope means that although the aforementioned articles establish in principle the right to personal mobility, they will continue to need to be supplemented by harmonising measures enacted by the Council aimed at removing the non-discriminatory but nevertheless effective barriers to the untrammelled exercise of this right. For this reason Article 57, and possibly Articles 49, 54 and 63 as well,[70] all give the Council authority to issue harmonising legislation beyond the end of the transitional period. The continuing necessity for such legislation explains why the Court went out of its way in Reyners (2/74) to stress that even though Council directives are no longer needed to bring about freedom of establishment, they still preserve "an important scope in the field of measures intended to make easier the effective exercise of the right to freedom of establishment."[71] The Council has, in fact, enacted a considerable amount of harmonising legislation since the end of the transitional period, which, together with that enacted previously, constitutes an autonomous source of Community law.[72]

A second limitation on the effectiveness of the directly applicable Treaty articles has to do with the nature of some discriminatory practices that are impossible to eliminate in the absence of detailed rules on how this is to be done. For instance, it is theoretically possible for a non-national to claim that the refusal of a host state to take into account insurance periods completed under the social security legislation of another Member State is discrimination in fact and to challenge this refusal on the basis of the Treaty alone. However, it is difficult to see how a court could accede to such a demand, as the mechanics involved in merging the rights obtained under different national social security systems are extraordinarily complex, as the regulations dealing with this matter attest. Similar problems exist with regard to double taxation and the recognition of foreign companies. As a result the Treaty provides for the implementation of personal mobility rights in these areas through Community secondary legislation[73] or conventions between the Member States,[74] in the absence of which the rights are incapable of exercise.[75] Here, too, the non-Treaty sources constitute autonomous Community law.

With these two exceptions the direct applicability of Articles 48, 52 and 60, paragraph 3 means that they supersede Community secondary and national legislation as the main source of personal mobility rights as from the end of the transitional period. But these articles are couched in very general language, and even where it is possible to give effect to them without the need for further implementing measures, it is preferable that the rights that they enshrine be spelled out more closely. It is this subsidiary role that is now assigned to the non-Treaty sources of Community law, which, by setting out detailed rules, ensure the effective exercise of the Treaty rights.

The Court of Justice has endorsed this subsidiary role of Community secondary and national legislation, referring, for example, in Royer (48/75) to the "closer articulation [given] by regulations and directives implementing the Treaty" and to the provision in such legislation of "detailed rules for the exercise of rights conferred directly by the Treaty."[76] Often the Court will base its decision on both the Treaty provisions and the secondary legislation, as it did in Marsman (44/72) when it held the dismissal of a Dutch worker by his German employer to be a violation of Article 48 and Regulation 1612/68.[77] Against the background of this jurisprudence it is therefore a little surprising that in Reyners (2/74) the Court characterized the directives issued by the Council in the area of establishment and services as "superfluous with regard to implementing the rule on nationality."[78]

Doubtless the Court was anxious to make it clear that freedom of establishment and services no longer depended on the Council's legislation, but its language is surely too categorical. The directives in question, which deal with the many practical obstacles to freedom of establishment or to the provision of services with respect to a particular activity, are as much a "closer articulation" of the Treaty provisions as all the other secondary and national legislation on personal mobility. An unfortunate consequence of the way the Court expressed its decision in Reyners (2/74) is that the Council has not issued any more directives at all under Articles 54 and 63 of the Treaty, despite the fact that the Court accepted the continuing validity of the harmonising measures contained within them. The result is that many non-discriminatory obstacles to free movement remain that might otherwise have been removed, and there is a paucity of detailed rules on the implementation of the right to establishment and the provision of services.

Whether autonomous or subsidiary, all non-Treaty sources of Community law must continue to be consistent with the Treaty if they are not to be struck down by the Court of Justice.[79] In addition, where the non-Treaty law is subsidiary to the Treaty, Articles 48, 52 and 60, paragraph 3 may be relied on to create or supplement rights that are missing or inadequately expressed in the implementing legislation.[80] In Royer (48/75) a French national was expelled from Belgium inter alia for failing to obtain a residence permit as required by Belgian legislation enacted pursuant to Directive 68/360 on the entry and residence of non-nationals from other Member States. The Court of Justice took the view that an E.E.C. national's right of residence in a Member State arises directly from the Treaty independently of the issue of a residence permit by the national authorities of the host state and that, consequently, it could not be lost by a failure to obtain the permit. To the extent that the Belgian law and Directive 68/360 provided otherwise, they were inconsistent with the Treaty, which could be relied on to create a right of residence for M. Royer that they denied him. Sometimes the Court will avoid direct reliance on the Treaty by giving the Community secondary legislation a wide interpretation that corrects any inconsistencies or inadequacies. An example is Fiorini (32/75), where, in order to uphold an Italian family's claim to a fare reduction card on the French national railways, it was necessary to expand the scope of Article 7(2) of Regulation 1612/68 to cover all social benefits despite its apparent confinement to benefits connected solely with the wage-earner's contract of employment. Whichever approach is used, however, the result is the same, namely that subsidiary Community or national legislation is not allowed to curtail or eliminate rights that are conferred by directly applicable Treaty provisions. This is the most significant difference between this type of legislation and the autonomous non-Treaty law, for in the latter case there can be no reliance on the Treaty as a corrective or supplement.

THE SCHEME OF THE TREATY

Article 48 to 66

Articles 48 to 66 of the E.E.C. Treaty contain the operative provisions on personal mobility. They are divided into three separate chapters that deal respectively with persons working in another Member State under a contract of employment, the foreign establishment of the self-employed, and the provision of services across national borders. The provision of services is not, as such, part of the free movement of persons, but it becomes a matter of personal mobility when either the provider or the recipient of the services wish to enter and remain in another Member State for the purpose. Whether a foreign national is in fact providing services or establishing himself in a host state depends on the nature of his attachment to that state. Establishment requires a certain degree of permanence, whereas providers of services pursue their activities "on a temporary basis, without establishing themselves and for a length of time appropriate to the nature of the services being performed, the centre of their operations remaining fixed in another Member State."[81]

Both the Court and the Council have endeavoured to create an integrated scheme of personal mobility rights out of Articles 48 to 66 in spite of differences between the chapters. The Court has stressed on numerous occasions that all three chapters are based on identical principles,[82] and it has made good on this general observation by attenuating some of the semantic differences between them.[83] The Council has contributed towards this integrating process in its legislative programme. The right to special social security arrangements and to continued residence after the cessation of a person's working life, which are authorized only in the chapter on workers, are extended to the self-employed by Regulation 1390/81 and Directive 75/34 respectively. Moreover, the Council's directives on the mutual recognition and coordination of health care qualifications have been issued under Article 49 to cover workers in addition to Article 57, which expressly authorizes them for the self-employed. Although these practices are in keeping with the concept of personal mobility, which implies the guarantee of all the rights needed to bring it about, the Council has frequently protected itself by basing the legislation in part on its residual power under Article 235.[84] The Council has also acted to bridge the difference in the wording of the public policy exception. Article

48(3) restricts its application for workers to entry and residence, whereas in Article 56 it applies to all the personal mobility rights of the self-employed; but the Council has achieved uniformity by adopting the more restrictive approach of Article 48(3) for both categories of persons.[85]

There are some differences between the chapters that cannot be effaced because they reflect the particular nature of the problems to be resolved. The chapter on establishment, for example, contains provisions dealing with the free movement of companies[86] and company personnel[87] that are not relevant to labour mobility or the provision of services. Conversely, the setting up of "appropriate machinery to bring offers of employment into touch with applications for employment"[88] only concerns employees. There are also differences in the legislative machinery for bringing about the various freedoms during the transitional period. Article 49 contemplates the immediate use of directives and directly applicable regulations in order to achieve the free movement of labour, while Article 54(1) and 63(1) envisage the drawing up of general programmes on freedom of establishment and the provision of services, to be followed by secondary legislation in the form of directives only.[89] Clearly the machinery in the latter case, with its emphasis on preparation and national coordination, reflects the peculiarly complex problems posed by the free movement of self-employed persons. These legislative differences, however, have now been superseded by the direct applicability of the Treaty.

The compartmentalization of personal mobility into three separate chapters has been criticized as superfluous and counter-productive. In particular it has been held responsible for creating a gap in the scheme. Wyatt and Dashwood give the example of a British camera crew that travels to France to film some scenes and then returns home.[90] As employees the crew are not covered by Article 48 because they are not working for a French employer; they are not established in France because of the temporary nature of their assignment; and they do not come within Article 60, paragraph 3 as they are not providing any services. However, the criticism is not altogether fair, as the gap is as much a consequence of the wording of the articles as of their compartmentalization. It is also possible that the Treaty can be used to bridge this gap.[91] A more cogent criticism is that the division of self-employed activities into two chapters poses the problem of deciding when a temporary establishment in the host state becomes permanent so as to bring the non-national within the purview of Article 52 and its secondary legislation.[92] But even here it should be remembered that there are differences which necessitate this compartmentalization. Nor should the criticisms obscure the essential unity underlying the three chapters, which, in the words of the Court of Justice, "are based on the same principles both in so far as they concern the entry into and residence in the territory of member-States of persons covered by Community law and the prohibition of all discrimination between them on grounds of nationality."[93] In the study that follows, personal mobility in the E.E.C. is treated as just such an integrated system.

The Role of Article 7 of the Treaty and the Interpretation of Articles 48 to 66 by the Council and Court

The relationship between Article 7 of the Treaty, which contains a general prohibition against "any discrimination on grounds of nationality," and Articles 48 to 66, which deal with such discrimination within the specific area of personal mobility, has engendered some disagreement. The view has been advanced by national courts,[94] the Commission,[95] an Advocate-General[96] and at least one scholar[97] that Article 7 has independent legal force and can be used to supplement the Treaty provisions on personal mobility. However, this view runs counter to the rule of treaty interpretation that requires specific provisions to take precedence over general rules. It is all the more difficult to accept that this rule should be ignored in this case considering the explicit declaration in Article 7 that it operates "without prejudice to any special provisions contained [in the Treaty]." There is also the point that, if Article 7 were applicable to the free movement of persons, its immediate direct applicability[98] would have wreaked havoc with the careful transitional arrangements contained in Article 49, 54 and 63.

With few exceptions[99] the Court of Justice has held fast to the traditional rule and refused to apply Article 7 to cases involving personal mobility. It has preferred instead to give a wide interpretation to Articles 48 to 66[100] and to the secondary legislation of the Council.[101] Its general attitude towards the relationship between Article 7 and the personal mobility provisions of the Treaty has been to assign to the latter the task of implementing the general prohibition on discrimination:

> Article 7 of the Treaty provides that within the scope of application of the Treaty, any discrimination on grounds of nationality shall be prohibited. As regards employed persons and persons providing services, this rule has been implemented by Articles 48 to 51 and 59 to 66 of the Treaty respectively and by measures of the Community institutions adopted on the basis of these provisions.[102]

What the Court has done, in fact, is to render unnecessary the autonomous use of Article 7 by its interpretation of the personal mobility law contained in the Treaty, which is broad enough to remedy any deficiencies in the actual wording of the provisions. In this endeavour it has been greatly aided by the Council, which from the start took a liberal view of the Treaty in framing its own legislation.

One provision that could have limited personal mobility within the Community is found in Articles 52 and 60, paragraph 3, which accord to non-nationals establishing themselves or providing services in another Member State the same treatment as nationals.[103] If this provision were read as merely requiring national treatment, it would be wholly inadequate, for, although national treatment eliminates discrimination based openly on nationality, it leaves untouched laws of general application that have the same effect in fact. It would, for example, permit a host state to require willy-nilly the possession by a non-national of its own qualifications even where there is no objective justification for doing so. But in Title III of the general programmes on establishment and the provision of services, which is incorporated by reference into the directives on self-employed activities,[104] the Council interprets Articles 52 and 60, paragraph 3 as requiring the elimination of all national laws of general application "where, although applicable irrespective of nationality, their effect is exclusively or primarily, to hinder the taking up or pursuit of...activity by foreign nationals."[105] In other words, the wording of the articles is not to be construed as permitting discrimination in fact.[106]

The consistency of the Council's approach with the Treaty was tested in Thieffry (71/76), when a Belgian claimed on the basis of the recognized equivalence between his Belgian law degree and a French law degree that he was exempt from the national requirement for the French degree as a prerequisite for admission to the Paris bar. The Court of Justice had no hesitation in upholding the broader language of the general programmes, which it characterized as "useful guidance for the implementation of the relevant provisions of the Treaty,"[107] and it ruled that a non-national cannot be denied admission to a particular profession "solely by reason of the fact that...[he]...does not possess the national diploma corresponding to the diploma which he holds and which has been recognised as an equivalent qualification."[108] The Court followed the same course in Patrick (11/77), when it upheld a British architect's right to practice in France on the strength of his British qualification.

A second problem that is dealt with by the Council is the wording of Article 52, which appears to preclude from its ambit domestic nationals who wish to set up a primary establishment in their own country.[109] This would mean that a Frenchman in the position of the plaintiffs in Thieffry (71/76) and Patrick (11/77) would not have been able to rely on the Treaty in order to obtain a right to practice without the need to re-qualify in France. This is a particularly anomalous situation as the domestic national is not similarly excluded from reliance on the Treaty in the case of secondary establishment,[110] or if he intends to work as a paid employee[111] or to provide services.[112] Once again, however, the Council comes to the rescue by defining the beneficiaries of the right of establishment in Title I of the General Programme on establishment in such a way as to include domestic nationals.[113] As with Title III, Title I is incorporated into the Council's directives on establishment.[114]

It was long thought that the Council had overstepped its authority by this expansive definition of the beneficiaries of the right of establishment, but the issue did not come before the Court of Justice until February 9th, 1979. On that day the Court handed down two judgements; one of these, Auer (136/78), is inconclusive, but the other, Knoors (115/78), supports in essence the Council's position.

In the first case, M. Auer, a naturalized French citizen, contested the refusal of the French authorities to permit him to practice in France as a veterinarian on the basis of his Italian qualifications. The Court upheld the refusal and seemed to suggest that this was because M. Auer as a domestic national was not protected by Article 52. On the other hand, it was very clear from the evidence before the Court that M. Auer's Italian qualifications were, in the words of Advocate-General Warner, "substantially less than equivalent to those required of persons who have qualified for that profession in that member-State."[115] The Court's decision could, therefore, be seen as a recognition of the objective justification for the French requirement in the circumstances, rather than as a repudiation of the Council's approach. And, in view of the Knoors decision (115/78), which was rendered on the same day, it is suggested that this is the better view.[116]

Knoors (115/76) concerned a Dutchman who had worked as an independent plumbing contractor in Belgium from 1970 to 1976 and who was seeking to take advantage of the transitional arrangements contained in Directive 64/427 in order to obtain authorisation to carry on the same trade in his native country. The Dutch government admitted that pursuant to Article 1(1) of the directive, which incorporates Title I of the General Programme on establishment, Mr. Knoors was entitled to rely on the directive, but it argued that the directive was ultra vires Article 52 of the Treaty in extending the transitional arrangements to domestic nationals. In support of its position the Dutch asserted that, were it otherwise, domestic nationals would be able to evade the application of national laws by working or studying abroad. The Court of Justice was sympathetic to this assertion while at the same time explicitly upholding the scope of Title I of the general programme. In a carefully balanced judgment it agreed that domestic nationals are not covered by Article 52, or indeed by any of the Community provisions on personal mobility, as long as they have not severed their connection with their home country. It based this view, not on any subtle nuances of meaning within the Treaty provisions, but on the broader principle that the Treaty does not apply to purely internal situations.[117] Community personal mobility law is, however, applicable in its entirety to domestic nationals when, in the words of the Court, "[they] are, with regard to their state of origin, in a situation which may be assimilated to that of any other person enjoying the rights and liberties guaranteed by the Treaty."[118] Under the economic personal mobility regime of the E.E.C. Treaty this assimilation will take place when the domestic national acquires a right of residence in another Member State based on his employment or establishment there.[119] A temporary stay in another Member State for the purpose of looking for work[120] or providing services would not be sufficient to sever the home connection. In Knoors (115/76) the plaintiff was indeed established in another Member State and was thus covered by Article 52 of the Treaty. It is a further distinguishing feature of the Auer case (136/78) that even if M. Auer had resided permanently in Italy, which is not certain, he did so as an Austrian national and was not thereby assimilated to the position of a migrant E.E.C. national.

The final contribution of the Council towards widening the scope of the Treaty provisions on personal mobility has been to refuse to regard Article 48(2) as exhaustive of the right of non-national workers to equal treatment in the host state. In its secondary legislation it goes beyond rights directly connected with conditions of employment, which are all that are mentioned in Article 48(2), and provides for family[121] and housing[122] rights, minority educational rights[123] and the transferability of driving licences.[124]

The Court of Justice has not only endorsed these provisions but, on occasion, given them even wider scope than their wording would seem to permit. In *Michel S* (76/77), for example, it held that a Belgian means-tested grant to handicapped persons was payable to the son of an Italian worker under Article 12 of Regulation 1612/68, which guarantees for the children of non-nationals access to "general educational, apprenticeship and vocational training courses." It argued, somewhat disengenously, that the fact that such a benefit was not included in the wording of Article 12 did not mean that the Council intended to exclude it and dismissed any suggestion that it was different in kind from the courses mentioned.[125] Similarly, in *Fiorini* (32/75), the Court extended Article 7(2) of the same regulation to cover a family fare reduction card on the French national railways despite its evident limitation to benefits connected with the wage-earner's contract of employment.[126] It took the view that the references to reinstatement and re-employment in the article, implying as they did the termination of the employment relationship, demonstrated that the provision was meant to include all available social advantages.[127] This reasoning is not entirely convincing, as the terms of a worker's reinstatement and re-employment would seem to be intimately connected with his conditions of work.

The Court's decisions in *Michel S* (76/72) and *Fiorini* (32/75) must be seen in the context of its own concern to ensure that, despite their vague and sometimes limited wording, Articles 48 to 66 properly reflect the right of a non-national to equal treatment in the host state; for, as the Court points out in *Walrave and Koch* (36/74), "Articles 7, 48, 59 have in common *the prohibition*, in their respective areas of application, *of any discrimination on grounds of nationality*."[128] This view was repeated in *Royer* (48/75), where reference was again made in connection with Articles 48 to 66 to "the prohibition of *all* discrimination...on grounds of nationality."[129] In *Fracas* (7/75) and *Choquet* (16/78) the Court was given the opportunity to put its general principle into practical effect. In the first case it took the position that a right to social security benefits under Regulation 1408/71 can accrue to the handicapped child of a non-national even after the child reaches majority regardless of the derivative nature of family rights bestowed by the regulation,[130] and it based this decision firmly on the father's right to equal treatment that flows directly from the Treaty.[131] In Choquet (16/76) the Court agreed that the Treaty right to equal treatment gives a non-national the privilege of refusing to take another driving test in a host state where "the conditions imposed...are not in proportion to the requirements of road safety."[132]

As a result of the Council's legislation and the Court's jurisprudence it is possible for an E.E.C. national to rely on Articles 48 to 66 and its implementing legislation for all his personal mobility rights without the need for recourse to Article 7. There remains, however, the question of whether Article 7 could be used to extend the scope of the Community concept of personal mobility itself beyond its economic parameters, for, unlike Article 48 to 66, it does not expressly premise the abolition of discrimination on a work connection. A suggestion that this is possible is furnished by the regulations on social security,[133] which apply to persons without the necessary work connection, such as tourists,[134] and which cite Article 7 as an authority for their issuance. But the Court of Justice has refused to recognize that the wider scope of these regulations is due to the independent legal force of Article 7. In Maison Singer (44/65), which concerned a holidaymaker's posthumous claim to be covered by the Community social security rules, the Court anchored them firmly within the concept of economic personal mobility:

> Since the establishment of as complete a freedom of workers' movement as possible is thus inscribed among the 'foundations' of the Community, it thus constitutes the ultimate aim of Article 51, and thereby affects the exercise of the power which it grants to the Council. It would not be in uniformity with that spirit to limit the notion of 'worker' solely to migrant workers stricto sensu or solely to movement related to the carrying out of their duties.[135]

The Court's reasoning is not entirely convincing, for it is difficult to see how the achievement of labour mobility is advanced by according social security benefits to holidaymakers. On the other hand, the refusal to countenance an extension of the scope of personal mobility doubtless accords with the basic economic objectives of the Treaty, which surely apply to Article 7 as well despite its broad wording.

The National Security Exception (Articles 223 to 225)

Unlike the public policy exception and the exception based on the exercise of public authority or on employment in the public service, which relate specifically to personal mobility and are dealt with in Chapter 2D and Chapter 3E respectively, the national security provision has general application and affects the totality of the Member States' obligations under the Treaty. As far as personal mobility rights are concerned, it entitles a Member State to disregard them when they relate to "the essential interests of its security which are connected with the production of or trade in arms, munitions and war material."[136] The employment of exclusively national labour in the arms industry could, therefore, be justified under this exception. In addition, a Member State may ignore Articles 48 to 66 "in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war or serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security."[137] Under this provision it would, for example, be possible for a Member State facing an insurrection against constitutional authority to suspend the rights of entry and residence accruing under the Treaty to E.E.C. nationals.

The Member States do not possess a completely free hand to make use of the security exception as they wish. Pursuant to Article 225, paragraph 1, the Commission is empowered to examine the measures taken by a Member State where they have the effect of distorting the conditions of competition in the common market. Under paragraph 2 of the same article the Commission or any other Member State may challenge the measures before the Court of Justice, if they consider them not to fall within the exception. In such a proceeding the Court is to give its ruling _in camera_.[138]

The E.E.C. Personal Mobility Provisions and the Treaty Obligations of Member States

Within the area of personal mobility there are two possibilities for conflict between E.E.C. law and other international obligations of the Member States. The first of these is a purely internal matter within the European Communities and concerns the European Coal and Steel Community Treaty and the European Atomic Energy Community Treaty. The second is the regional economic union between Belgium, Luxemburg and the Netherlands.[139] All three treaties are dealt with expressly in the E.E.C. Treaty. Article 232 provides that the other two Community treaties are to apply in their entirety, which means in practical terms that E.E.C. nationals that come within their purview can claim any benefits they confer in addition to their rights under the E.E.C. Treaty.[140] The treatment of the Benelux Economic Union may not be so generous. According to Article 233 of the E.E.C. Treaty it is operative only in so far as its objectives are not attained within the E.E.C., which could mean that in areas where there is E.E.C. law, this will prevail even if the Treaty of Economic Union would confer greater advantages. This restrictive view of Article 233 has been disputed by some writers, who claim that, despite its different wording, this article envisages the same cumulation of benefits as Article 232.[141]

COMMUNITY LAW AND THE PROTECTION OF FUNDAMENTAL RIGHTS

The question of the protection of Community nationals and entities against the violation of their fundamental rights by the acts of Community institutions, and to a lesser extent by the operation of the Treaty provisions themselves,[142] has engendered much controversy. The crux of the problem is that the Community treaties contain no code of fundamental rights and the Community has not been willing or able to fill this gap by acceding to the European Convention on Human Rights.[143] As a result it has been left up to the Court of Justice as the interpreter of the Treaty to develop and enforce a concept of fundamental rights within the context of Community law. In fulfilling this task, the Court has not always satisfied its critics.

The issue of fundamental rights first came before the Court in Stauder (29/69), where the beneficiary of a Community scheme for selling butter more cheaply to people of limited means objected to having to reveal his name and address to the retailer. He claimed that the requirement of nominative identification violated his rights under the German constitution. The Court ignored the national constitutional issue but did recognize that the general principles of Community law included the protection of fundamental rights and that it was its duty to see that these principles were respected.[144] On the facts of the case, however, the Court found that no fundamental right had been violated.

The Court's language in Stauder (29/69) is very general; it does not elucidate on the scope of the protection to be afforded to fundamental rights at Community law, nor does it deal with the issue of national constitutional guarantees. The Court was more forthcoming a year later in Internationale Handelsgesellschaft (11/70) when it was faced with a reference from the Frankfurt Administrative Court (Verwaltungsgericht) concerning two Community regulations that seemed to violate the right to pursue trade activities enshrined in Article 12 of the German constitution. The action was brought by a German exporter who had had to forfeit over 17,000 marks for failing, through no fault of his own, to make full use of a Community licence to export maize groats. This considerable sum of money had been deducted by the German authorities from the exporter's initial deposit to obtain the licence pursuant to Regulation 473/67. In its reply to the reference, the Court of Justice rejected categorically any recourse to national constitutional law as a criterion for judging the validity of Community law. "Therefore," the Court maintained, "the validity of a Community instrument...cannot be affected by allegations that it strikes at either the fundamental rights as formulated in that State's constitution or the principles of a national constitutional structure."[145] In place of such national guarantees the Court sought to establish a Community concept of fundamental rights that was to have as its source "the constitutional principles common to the member-States"[146] and to ensure that the protection of such rights took place "within the framework of the Community's structure and objectives."[147] The Court then proceeded to hold that the regulation in question did not violate this Community concept of fundamental rights.

The decision of the Court of Justice in Internationale Handelsgesellschaft (11/70) led to an open rift with the German judiciary. The Frankfurt court flatly refused to be bound by a Community concept of fundamental rights that legitimised legislation which, in its view, was contrary to the German constitution, and it referred the matter to the German Federal Constitutional Court.[148] This court, while upholding the regulation itself, agreed with the Frankfurt court on the wider issue of the supremacy of the national constitutional guarantees. It took the position that the transfer of German sovereign powers to the Community under Article 24 of the German constitution was subject to these guarantees as long as the Community had not developed an adequate alternative. In the view of the German Constitutional Court, no such alternative was available:

> The Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long term measured by the standard of the Constitution with regard to fundamental rights (without prejudice to possible amendments) in such a way that there is no exceeding the limitation indicated, set by Article 24 of the Constitution. As long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of the further integration of the Community, the reservation derived from Article 24 of the Constitution applies.[149]

This decision, in its turn, has been the subject of much criticism. Within the court itself three out of the eight presiding judges dismissed the call by the majority for a codified catalogue of fundamental rights on the ground that "the assertion that only a codification offers an adequate certainty of law does not bear examination."[150] This criticism has been echoed by academic writers, who have accused the German court of inflexibility and a lack of realism.[151] The minority judges, and the writers who support them,[152] also reject the court's demand for changes in the functioning of the European Parliament as largely irrelevant to the question of the protection of fundamental rights.[153]

Despite the furore that it caused, the objection of the German Constitutional Court to the approach of the Court of Justice was surely justified in principle if not in its details; for the European Court's concept of fundamental rights was not only vague but somewhat suspect in its reference to "the Community's structure and objectives." Some more tangible and reassuring evidence of the Court's genuine concern for individual rights was clearly in order, and such evidence was in fact provided by the Court itself two weeks prior to the decision by the German court. In Nold (4/73), a reference on the validity of a Community decision which had the effect of depriving a German merchant of much of his business, the Court re-defined the sources of the Community concept of fundamental rights by including international treaties on the subject:

> As this Court has already held, fundamental rights'form an integral part of the general principles of law which it enforces. In assuring the protection of such rights, this Court is required to base itself on the constitutional traditions common to the member-States and therefore could not allow measures which are incompatible with the fundamental rights recognized and guaranteed by the constitutions of such States. The international treaties on the protection of human rights in which the member-States have co-operated or to which they have adhered can also supply indications which may be taken into account within the framework of Community law.[154]

The Nold decision (4/73) is still couched in general terms, but it seems to have allayed much of the criticism of the Court's earlier judgments. In a written reply to a question from a member of the European Parliament, the German government declared that, as a result of Nold

(4/73), it was unlikely that the Constitutional Court would again challenge Community legislation on the basis of German constitutional guarantees.[155] This has proved to be the case, and no objections have been raised to the European Court's decisions in Nold (4/73), Hauer (44/79) and Testa (41/79), all of which upheld Community legislation that was questionable under German constitutional law. The demand for institutional change in the Community seems to have been tacitly dropped.

The practical effect of the new principles enunciated in Nold (4/73) was not immediately apparent, as the Court merely noted in that case that the plaintiff's objection was groundless. But little more than a year later, in Rutili (36/75), the Court made its first express reference to the European Convention on Human Rights in connection with a ruling that the partial restriction imposed by France on the residence of an Italian national was contrary to E.E.C. law:

> Taken as a whole, the limitations placed on the powers of member-States [by Community law] in respect of control of aliens are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10, and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms,...and in Article 2 of Protocol 4 of the same Convention,...which provide, in identical terms, that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted Articles other than such as are necessary for the protection of those interests "in a democratic society."[156]

The significance of these words should not be exaggerated, for, as Advocate-General Trabucchi points out in his submission in Watson and Belmann (118/78), "it seems clear...that the spirit of the judgment did not involve any substantive reference to the provisions [of the Convention] themselves but merely a reference to the general principles of which, like the Community rules with which the judgment drew an analogy, they are a specific expression."[157] What Rutili (36/75) does do, however, is to indicate that, despite the broad language of Nold (4/73), the Court of Justice is above all concerned with the European Convention. The other international treaties on human rights, such as the U.N. Covenants on Economic, Social and Cultural Rights and on Civil and Political Freedoms, have not yet figured in the Court's jurisprudence.

The best example of the Court's use of its sources of fundamental rights is Hauer (44/79), where it was asked to pronounce on the validity of a Community regulation that was used as the basis for denying a German wine-grower the authorisation to plant vines on land suitable for wine-growing. Once again there was an alleged infringement of German constitutional guarantees--in this case the right to property--and the Court began its considerations by re-affirming its objection to the use of national constitutional norms for judging the validity of Community law. The introduction of such external criteria would, it said, damage "the substantive unity and efficacy of Community law, [and] lead inevitably to the destruction of the unity of the Common Market."[158] Then, applying the principles set out in Nold (4/73), the Court went on to consider the property rights accorded by Article 1 of the First Protocol to the European Covention[159] and noted that the article permits a derogation from these rights when a state wishes "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest...." Finally, the Court reviewed the constitutional traditions of the Member States and noted that, in the context of this exception, restrictions similar to those contained in the Community regulation at issue were generally accepted. It therefore concluded that the regulation did not violate the Community concept of fundamental rights.

There is no doubt that this type of reasoning is a welcome improvement on the Court's previous vagaries, but it leaves unanswered the crucial "question of the exact status of the European Convention at Community law. Are the rights guaranteed by the Convention, which, in the areas of family rights (Article 8), discrimination (Article 14) and minority educational rights (Article 2 of the First Protocol), go beyond the personal mobility provisions of the E.E.C. Treaty, now an intrinsic part of Community law, or are they merely guidelines that the Court may apply or ignore at its discretion? This issue was raised on at least two occasions, in Prais (130/79) and Pecastaing (98/79), and both times it was side-stepped by the Court. The closest the Court has come to a positive answer to the question is in National Pansonic (136/79), where it rejected a complaint that a Community decision to investigate a business in the absence of the company's lawyers constituted an infringement of Article 8, paragraph 1 of the European Convention. By basing its decision exclusively on the exception contained in paragraph 2 of the same article, it raised the inference that it considered itself bound by the Convention.

The confusion surrounding the status of the European Convention could easily be removed by the Community acceding to it, a move that has been urged by the Commission[160] and by those scholars who are not impressed by the Court's case-law approach.[161] The accession of the Community to the Convention would also plug a possible gap in the latter's enforceability that has arisen because of the transfer of national sovereign powers to the Community. This problem was highlighted in the C.F.D.T. case before the European Commission of Human Rights.[162] A French trade union organization, which had been consistently excluded by the Council of the Communities from membership of the Consultative Committee of the Coal and Steel Community because of the refusal of the French government to recommend its appointment, alleged a violation of its rights under Articles 11, 13 and 14 of the

European Convention. The Commission, however, refused to hear the matter for lack of jurisdiction. It took the view that it had no jurisdiction ratione personae over the Community as it was not a signatory to the Convention, nor over the Member States in this instance as they had not exercised their jurisdiction under Article 1 of the Convention by their participation in the decision of the Council. Although the Member States had acted in a purely advisory capacity in the C.F.D.T. situation, the decision opens up the possibility that a similar exclusion of jurisdiction could operate whenever the administrative organs of a Member State are acting as agents of the Community.[163] Considering the extent of the transfer of sovereign rights to the Community, such a development would seriously undermine the usefulness of the Convention.

But there are some who are less enthusiastic about the accession of the Community to the European Convention. Pescatore, speaking from the perspective of a former judge of the Court of Justice, maintains that the rights conferred by the Convention are precarious and its decisions susceptible to political pressures.[164] Perhaps a more objective criticism is that of Scheuner, who considers that the European Convention with its emphasis on political and intellectual freedoms is not ideally suited to protecting the economic freedoms that are more likely to be infringed by Community law.[165] Neither objection is, however, entirely convincing. Pescatore's comments convey a scepticism that the record of the European Commission in large part belies, and the frequency with which the Convention has been cited in cases before the Court of Justice would suggest that it is not without relevance in the context of Community law. Indeed, as was pointed out earlier,[166] it deals with rights that are directly related to personal mobility, to mention but one area of Community law.

On balance it would seem that more would be gained than lost by the Community acceding to the European Convention. The Community would gain a clear and unambiguous code of fundamental rights, which could, if necessary, be supplemented by other sources, and the Convention would be vouchsafed a comprehensive enforceability. Perhaps more importantly, any misgivings that have been created by the Court of Justice's disturbing tendency to reject any challenge to the validity of Community legislation would be laid to rest.

FOOTNOTES

Chapter 1

[1] Note the treatment of discrimination in fact at international law in Minority Schools in Albania, Case No. 182, P.C.I.J., Series A/B, No. 64. In this case the Permanent Court of International Justice held that an Albanian law abolishing private schools violated that country's undertaking to the League of Nations to accord equal treatment in law and in fact to its minorities. The Court took the view that such a measure would deprive the minorities of an important means of preserving their identity while leaving the Albanian majority unaffected. See, also, Chapter 3B, pp. 194-198 for a discussion of discrimination in fact in the context of Community law.

[2] See the attitude of the Court of Justice of the European Communities towards such national measures in Chapter 3B, pp. 222-223. See, also, section 6 of the Canadian Charter of Rights and Freedoms, which permits "laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence" (emphasis added). A requirement that an Albertan teacher requalify in Ontario, for example, would come under this exception, as long as it could be objectively justified; it would not then constitute discrimination primarily on the basis of extraprovinciality.

[3] The common economic and social policies of the European Economic Community are beyond the scope of this study, but see Hans Smit and Peter Herzog, The Law of the European Economic Community (New York: Matthew Bender, 1976-1982), Vol. III.

[4] For a review of this type of discrimination in Canada and the attempt to provide for full economic personal mobility in section 6 of the new Canadian Charter ofRights and Freedoms, see Emilio S. Binavince, "The Impact of Mobility Rights," 1982, 14 Ottawa Law Review, 340.

[5] Article 48(3)(a) and (b).

[6] Article 52.

[7] Article 60, para. 3.

[8] E.g. the 3rd recital of the Preamble to Regulation 1612/68, which refers to freedom of movement as "one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement."

[9] See Co. Dir. 68/360, arts. 1, 3; Co. Reg. 1612/68, art. 5; Co. Reg. 1408/71, art. 69.

[10] Co. Dir. 73/148, art. 1(1)(a).

[11] Co. Dir. 73/148, art. 1(1)(b).

[12] Co. Reg. 1408/71, art. 2(1) requires only that a person be or have been subject to the social security legislation of a Member State that accords with the definition of such legislation in Article 1(a) of the regulation. This includes, therefore, persons who have never worked in more than one Member State, although the definition in Article 1(a) does eliminate persons who have no present or past work connection at all.

[13] *See Defrenne*, 43/75, [1976] 2 C.M.L.R. 98 at 129; *Watson and Belmann*, 118/75, [1976] 2 C.M.L.R. 532 at 571; *Donà*, 13/76, [1976] 2 C.M.L.R. 578 at 586.

[14] *Defrenne*, 43/75, [1976] 2 C.M.L.R. 98 at 129.

[15] *Unger*, 75/63, [1964] C.M.L.R. 319 at 330.

[16] *Royer*, (48/75), [1971] 2 C.M.L.R. 619 at 639.

[17] *See Unger* (75/63), *Bertholet* (31/64), *van Dijk* (33/64) and *Maison Singer* (44/65).

[18] *Unger* (75/63), *Maison Singer* (44/65).

[19] *Maison Singer* (44/65).

[20] Derrick Wyatt and Alan Dashwood, *The Substantive Law of the EEC* (London: Sweet and Maxwell, 1980) argue this viewpoint at pp. 126-127, ending with this conclusion:

"However one rationalises the fact, it is clear that the principles of interpretation applied to the provision regulating the free movement of workers are inspired by rather more than the dictates of *laissez-faire* economic theory. Their inspiration is no less than the ultimate aim of the Treaty 'to eliminate the barriers that divide Europe.'"

See, also, Andrew Durand, "European Citizenship," (1979), 4 *European Law Review*, 1 at 11. For the contrary position that is adopted in this study, *see* Smit and Herzog, op. cit., I, pp. 2-472ff.

[21] Co. Dir. 68/360, arts. 4(3)(b), 6(3) and 8(1).

[22] Co. Dir. 73/148, art. 6(b).

[23] Co. Dir. 73/148, art. 4(2), para. 1.

[24] *Donà*, 13/76, [1976] 2 C.M.L.R. 578 at 586 (emphasis added). *See*, too, *Walrave and Koch*, 36/74, [1975] 1 C.M.L.R. 320 at 334; *Defrenne*, 43/75, [1976] 2 C.M.L.R. 98 at 129.

[25] Wyatt and Dashwood, op. cit., pp. 126-127.

[26] Maison Singer, 44/65, [1966] C.M.L.R. 82 at 94. It is difficult to see how the movement of labour is advanced by extending the social security rules to workers who are not migrating. See, too, the discussion on pp. 36-37.

[27] The term "non-national" is used to denote persons who possess the nationality of a Member State of the Community other than that of the state in question; the term "E.E.C. national" is used to denote a person who possesses the nationality of any Member State; and, finally, the term "foreigner" means someone who holds the nationality of any state outside the Community altogether.

[28] Fracas, 7/75, [1975] 2 C.M.L.R. 442 at 455 (emphasis added).

[29] Advocate-General Trabucchi puts this point across very forcibly in Watson and Belmann, 118/75, [1976] 2 C.M.L.R. 552 at 561:

"In any case it would be a sound rule to avoid the fiction of using the actual wording of the Treaty to justify the extension to all citizens of the Community of a right to freedom of movement which the Treaty intended to apply only to clearly defined categories of persons."

[30] Article 54(1).

[31] Article 63(1).

[32] Article 220.

[33] Wyatt and Dashwood, op. cit., at p. 183, footnote 10 suggest that the general programmes may be binding on the Member States. The text of the Treaty, however, would appear to contradict this suggestion. In the first place, the language of Articles 54 and 63 seems to contemplate that the programmes shall constitute guidelines for subsequent binding secondary legislation. Secondly, the programmes are to be drawn up and issued by way of a decision sui generis; such an act, which falls outside the scope of Article 189, is generally not considered binding on the Member States unless, as in the case of Articles 84(2), 136(2) or 228, this is the clear intention of the Treaty.

The Court of Justice has never enforced the provisions of the general programmes in the absence of Community implementing legislation, and this, together with its reference in Thieffry, 71/76, [1977] 2 C.M.L.R. 373 at 403 to the "useful guidance for the implementation of the relevant provisions of the Treaty" provided by the programmes, strongly suggests that it views them only as having interpretive value. Most scholars also take this position - e.g. Smit and Herzog, op. cit., II, p. 2-556.

[34] Articles 164 and 173.

[35] The Court has frequently intervened to prevent the Community's social security rules from leading to a loss of rights conferred by national law alone, which it considers a violation of Articles 48 to 51 of the Treaty - see Moebs (92/63), Kalsbeek-Van der Veen (100/63), Ciechelski (1/67), De Moor (2/67).

[36] *See* K. Lipstein, *The Law of the European Economic Community* (London: Butterworths, 1974), p. 11; P.J.G. Kapteyn and P. Verloren van Themaat, *Introduction to the Law of the European Communities* (London: Sweet and Maxwell, 1973), pp. 113-114; Anthony Parry and Stephen Hardy, *EEC Law* (London: Sweet and Maxwell, 1973), p. 142; Lawrence Collins, *European Community Law in the United Kingdom* (London: Butterworths, 1975), p. 23; Gerhard Bebr, "Directly Applicable Provisions of Community Law: The Development of a Community Concept," (1970), 19 *Int. Coup. Law Qu.*, 257.

[37] *See* Wyatt and Dashwood, op. cit., pp. 25-26; J.A. Winter, "Direct Applicability and Direct Effect. Two Distinct and Different Concepts in Community Law," (1972), 9 *C.M.L. Rev.*, 425; P.S.R.F. Mathiysen, *A Guide to European Community Law* (London: Sweet and Maxwell, 1980), p. 100; Richard Plender and John Usher, *Cases and Materials on the Law of the European Communities* (London: Butterworths, 1976) p. 60; D. Lasok and J.W. Bridge, *An Introduction to the Law and Institutions of the European Communities* (London: Butterworths, 1976), p. 199; R.H. Lauwaars, *Lawfulness and Legal Force of Community Decisions* (Leiden: A.W. Sijthoff, 1973), p. 35.

[38] [1963] C.M.L.R. 105 at 132. *See*, too, *Da Costa* (28-30/62), *Lütticke* (57/65), *Molkerei-Zentrale* (28/67), *Salgoil* (13/68), *van Duyn* (41/74).

[39] *See Leonesio* (93/71).

[40] [1971] C.M.L.R. 1 at 8-10.

[41] [1971] C.M.L.R. 1 at 23.

[42] *See van Gend*, 26/62, [1963] C.M.L.R. 105 at 130; *Lütticke*, 57/65, [1971] C.M.L.R. 674 at 684; *Molkerei-Zentrale*, 28/67, [1968] C.M.L.R. 187 at 217; *van Duyn*, 41/74, [1975] C.M.L.R. 1 at 15.

[43] [1980] 1 C.M.L.R. 96 at 110 (emphasis added). *See*, too, *Grad*, 9/70, [1971] C.M.L.R. 1 at 24.

[44] *See* Lück, 34/67, [1968] E.C.R. 245 at 251; *Italy*, 48/71, [1972] C.M.L.R. 699 at 708; *France*, 167/73, [1974] 2 C.M.L.R. 216 at 229.

[45] *See Enka*, 38/77, [1978] 2 C.M.L.R. 212 at 232.

[46] *See France*, 167/73, [1974] 2 C.M.L.R. 216 at 230; *Italy*, 159/78, [1980] 3 C.M.L.R. 446 at 463.

[47] *See Grad*, 9/70, [1971] C.M.L.R. 1 at 23; *van Duyn*, 41/74, [1975] 1 C.M.L.R. at 15-16; *Verbond*, 51/76, [1977] 1 C.M.L.R. 413 at 429; *Ratti*, 148/78, [1980] 1 C.J.L.R. 96 at 110.

[48] *See Lück*, 34/67, [1968] E.C.R. 245 at 252.

[49] *See Grad* (9/70).

[50] This is suggested by Ami Baran, "Applicabilité Directe," (1978) 14 *Cahiers de Droit Européen*, 260.

[51] Bebr, op. cit., p. 290.

[52] It declared in *Grad*, 9/70, [1971] C.M.L.R. 1 at 23 that "by Article 189 regulations are directly applicable and may [*not must*] therefore certainly produce direct effects by virtue of their nature as law." *See*, too, *van Duyn*, 41/74, [1975] 1 C.M.L.R. 1 at 15; *Verbond*, 51/76, [1977] 1 C.M.L.R. 413 at 429; *Ratti*, 148/78, [1980] 1 C.M.L.R. 96 at 110.

[53] *See*, *supra*, p. 13-14.

[54] *Cohn-Bendit* (France).

[55] *See* Lipstein, op. cit., p. 11; Bebr, op. cit., p. 296; Parry and Hardy, op. cit., p. 150; Collins, op. cit., p. 48.

[56] *See* Lipstein, op. cit., p. 11; Bebr, op. cit., p. 296.

[57] *See* Lipstein, op. cit., p. 28; Bebr, op. cit., p. 280.

[58] *See* particularly *Ratti*, 148/78, [1980] 1 C.M.L.R. 96 at 110.

[59] [1980] 1 C.M.L.R. 96 at 112.

[60] *Van Duyn*, 41/74, [1975] 1 C.M.L.R. 1 at 19; *Verbond*, 51/76, [1977] 1 C.M.L.R. 413 at 429.

[61] *Ratti*, 148/78, [1980] 1 C.M.L.R. 96 at 110. The Court uses almost identical language in *van Duyn*, 41/74, [1975] 1 C.M.L.R. 1 at 15-16 and *Verbond*, 51/76, [1977] 1 C.M.L.R. 413 at 429.

[62] [1974] 2 C.M.L.R. 305 at 315-316.

[63] [1974] 2 C.M.L.R. 305 at 315.

[64] [1974] 2 C.M.L.R. 305 at 327; [1975] 1 C.M.L.R. 298 at 313-314.

[65] *Reyners*, 2/74, [1974] 2 C.M.L.R. 305 at 327. *Cf*. *van Binsbergen*, 33/74, [1975] 1 C.M.L.R. 298 at 314.

[66] *See* *Patrick*, 11/77, [1977] 2 C.M.L.R. 523 at 530 (Article 52); *van Wesemael*, 110/78, [1979] 3 C.M.L.R. 87 at 109 (Articles 59 and 60, paragraph 3).

[67] [1975] 1 C.M.L.R. 1 at 15.

[68] This case is discussed in more detail, *infra*, pp. 32-33.

[69] *Cf*. *Patrick* (11/77), where the refusal to permit a non-national the right to practice was considered discriminatory on the basis of the recognized equivalence of the foreign qualification.

[70] The matter is not free from doubt - *see*, *infra*, p. 24-25.

[71] [1974] 2 C.M.L.R. 305 at 327.

[72] This harmonising legislation is discussed in detail in Chapter 3C.

[73] Article 51, pursuant to which the Community regulations on social security have been issued.

[74] Article 220. Only one convention has been signed, namely that relating to the mutual recognition of companies and legal persons, but it has not been ratified. Little progress has been made on a convention relating to the avoidance of double taxation.

[75] Some scholars maintain that the mutual recognition of companies flows directly from the Treaty - *see* the discussion in Chapter 2C, pp. 121-124.

[76] [1976] 2 C.M.L.R. 619 at 638.

[77] *See, too, France* (167/73), where the Court's decision was based on Article 48 and Article 4 of Regulation 1612/68, and *Royer* (48/75), where both Article 48 and Directive 68/360 were cited by the Court.

[78] [1976] 2 C.M.L.R. 305 at 327. The Court has repeated this view in later cases - *see Patrick*, 11/77, [1977] 2 C.M.L.R. 523 at 530.

[79] *See* fn. 35. Theoretically the conventions concluded by the Member States pursuant to Article 220 should also be consistent with the Treaty, but, as the Court of Justice is restricted under Article 173 to reviewing the legality of acts of the Council and the Commission, it is difficult to see how this consistency can be ensured.

[80] *See* T.C. Hartley, "The International Scope of the Community Provisions Concerning Free Movement of Workers," *European Law and the Individual*, ed. F.G. Jacobs (Amsterdam/New York/Oxford: North-Holland Publishing Company, 1976), p. 207.

[81] Co. Dir. 65/1, art. 3(2); Co. Dir. 67/654, art. 4(2).

[82] *See Walrave and Koch*, 36/74, [1975] 1 C.M.L.R. 320 at 332; *Royer*, 48/75, [1976] 2 C.M.L.R. 619 at 636; *Watson and Belmann*, 36/74, [1976] 2 C.M.L.R. 532 at 570.

[83] *See infra*, pp. 30-36.

[84] Directives 80/154 and 80/155 on the activities of midwives are the exceptions as they are based solely on Articles 49, 57 and 66.

[85] *See* the discussion of the public policy exception in Chapter 2D.

[86] Article 54(3)(g).

[87] Article 54(3)(f).

[88] Article 49(d).

[89] Articles 54(2) and 63(2).

[90] Wyatt and Dashwood, op. cit., pp. 182-183. This gap is also discussed in Trevor Hartley, "The Internal Personal Scope of the EEC Immigration Provision," (1978), 4 *European Law Review*, 205 and in P. Leleux, "Recent Decisions of the Court of Justice in the Field of Free Movement of Persons and Free Supply of Services," *European Law and the Individual*, ed. F.G. Jacobs (Amsterdam/New York/Oxford: North-Holland Publishing Company, 1976), p. 84.

[91] *See* the discussion in Chapter 2A, pp. 73-80.

[92] *See* Smit and Herzog, op. cit., II, pp. 2-517ff.

[93] *Watson and Belmann*, 118/79, [1976] 2 C.M.L.R. 532 at 570; *Royer*, 48/75, [1976] 2 C.M.L.R. 619 at 636.

[94] *See* the wording of the reference from the national court in *Sagulo* (8/77) and *Kenny* (1/78).

[95] The Commission advanced Article 7 as the basis for the family's claim to a fare reduction card in *Fiorini* (32/75).

[96] *Manzoni* (112/78).

[97] Wyatt and Dashwood, op. cit., p. 190.

[98] *See Wilhelm* (14/68).

[99] *Rutili* (36/75) is one of the exceptions. In this case the Court ruled that a partial restriction on the residence of an Italian worker in France did not come within the public policy proviso of Article 48(3) and hence contravened Article 7. The Court's approach is puzzling, as it would have been more logical to base the contravention on Article 48 itself, which guarantees a right of entry and residence except in so far as the proviso applies.

[100] *See Thieffry* (71/76), *Patrick* (11/77) and *Knoors* (115/78), all of which are discussed later in this chapter on pp. 31-34.

[101] *See Michel S* (76/72) and *Fiorini* (32/75), which are discussed *infra* at p. 35.

[102] *Dona*, 13/76, [1976] 2 C.M.L.R. 578 at 586. *See*, too, *Walrave and Koch*, 36/74, [1975] 1 C.M.L.R. 320 at 332 and *Kenny*, 1/78, [1978] 3 C.M.L.R. 651 at 666. These words would also apply Article 52 to 58, which were not at issue in the *Dona* case (13/76).

[103] Article 52, paragraph 1, refers to "the right to take up and pursue activities as self-employed persons...under the conditions laid down for its own nationals by the law of the country where such establishment is effected," and Article 60, paragraph 3, refers to the provider's right to

"temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals."

[104] *See* the summary of these directives in the Appendix.

[105] General Programme on establishment, Title III, B. Similar wording is used in Title III, A, paragraph 4 of the General Programme on services.

[106] Mention should be made here of the Council's odd treatment of Article 48. The article itself prohibits *any* discrimination based on nationality, whether in law or in fact, but Article 1(1) of Regulation 1612/68 narrows down its scope to that of national treatment by according workers the right to pursue a livelihood "in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that state." This secondary provision is inconsistent with the Treaty, but the inconsistency is overcome by Article 3(1) of the regulation, which, in similar language to that used in the general programmes, indicates that Article 1(1) also prohibits discrimination in fact.

[107] [1977] 2 C.M.L.R. 373 at 403.

[108] [1977] 2 C.M.L.R. 373 at 404. *See*, too, more recently in *Webb*, 279/80, [1982] E.C.R. 3305 at 3324, where the Court states that Article 60, paragraph 3 "does not mean that all national legislation applicable to nationals of that State...may be similarly applied in its entirety to the temporary activities of undertakings which are established in other member-States."

[109] Freedom of primary establishment is accorded by Article 52 to "nationals of *a* Member State" who wish to set up "in the territory of *another* Member State" (emphasis added).

[110] Freedom of secondary establishment, i.e. the setting up of agencies, branches or subsidiaries, applies to "nationals of *any* Member State established in the territory of *any* Member State" (emphasis added).

[111] Article 48(1) speaks simply of the "freedom of movement for workers" and Article 48(2) requires "the abolition of any discrimination based on nationality between workers of Member States." There is no suggestion in either of these two paragraphs that domestic nationals are to be treated differently. But paradoxically, given its usually liberal attitude towards the Treaty, the Council excludes domestic nationals from the operation of Article 1(1) of Regulation 1612/68 on the right to earn a livelihood. This provision is inconsistent with the Treaty, and the English Court of Queen's Bench was wrong to apply it in *Ayub* (U.K.). For additional comments on the *Ayub* case, *see* fn. 117.

[112] Under Article 59 the freedom to provide services applies to "nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended." That this provision applies to domestic nationals was demonstrated by *van Binsbergen* (33/74), where it was relied upon by a Dutch national wishing to provide services in the Netherlands from his base in Belgium.

[113] They are defined quite simply as "nationals of Member States."

[114] *See* the summary of the directives in the Appendix.

[115] [1979] 2 C.M.L.R. 373 at 382.

[116] *See* Wyatt and Dashwood, op. cit., p. 189 for the opposite view. But *see*, too, the submission of Advocate-GeneralReischl in *Knoors*, 115/78, 1979 2 C.M.L.R. 357 at 362:

> "To refuse a French national...the right to establish himself in the country of which he has become a citizen appears to me to be a blatant infringement of Article 52, the aim of which is to enable each national of every member-State to practice his profession in any State of the Community and above all in the State of which he has acquired the nationality."

[117] This is an established precept of the Court's jurisprudence - *see Saunders*, 175/78, [1979] 2 C.M.L.R. 216 at 227. The decision of the English Court of Queen's Bench in *Ayub* (U.K.) can also be seen as an example of the application of this precept. A British woman went to seek work in Belgium and married a Pakistani during her stay in the host state. As a result of not being able to find employment in Belgium, she returned to England but her foreign husband was refused entry by an immigration official. The husband contested the refusal on the basis of the right of a migrant E.E.C. worker to be accompanied by her family under Article 10 of Regulation 1612/68. The English Court held, *inter alia*, that, as the woman had not obtained work in Belgium, she could not be considered a migrant worker with rights under E.E.C. law. It is suggested that this is a preferable basis for the decision - *see* fn. 111.

There is no doubt that the application of this precept can place domestic nationals at a disadvantage, for any other E.E.C. national in the place of Mrs. Ayub would have been able to claim a right of entry for her husband. This unfortunate anomaly is also illustrated in *Re Residence Permit for an Egyptian National* (Germany), where the Egyptian husband of a German woman was refused an unlimited right of residence and the right to work in Germany. As the German court itself pointed out at [1975] 2 C.M.L.R. 406, these rights would be available under Community law to the Egyptian husband of an Italian woman working and residing in Germany.

[118] [1979] 2 C.M.L.R. 357 at 366.

[119] Ibid.

[120] See *Ayub* (U.K.) and fn. 117.

[121] *See* Co. Reg. 1612/68, art. 10, 11, 12; Co. Dir. 68/360, art. 1.

[122] Co. Reg. 1612/68, art. 9.

[123] Directive 77/486.

[124] Directive 80/1263.

[125] [1973] E.C.R. 457 at 464.

[126] In doing so it disregarded its earlier decision in *Michel S* (76/72) that Article 7(2) is indeed limited to social advantages emanating from the wage-earner's contract of employment.

[127] [1976] 1 C.M.L.R. 573 at 582.

[128] [1975] 1 C.M.L.R. 320 at 332 (emphasis added). The same applies to Article 52.

[129] [1976] 2 C.M.L.R. 619 at 636.

[130] *See* the discussion on family rights in Chapter 4D, pp. 424-425 and 431-432.

[131] *See* [1975] 2 C.M.L.R. 442 at 455:
"Indeed, if this were not the case, a worker anxious to ensure to this child the lasting enjoyment of the benefits necessitated by his condition as a handicapped person, would be induced not to remain in the member-State where he has established himself and has found his employment, which would run counter to the object sought to be achieved by the principle of free movement of workers within the Community...."

[132] [1979] 1 C.M.L.R. 535 at 546.

[133] *See* Regulations 1408/72, 574/72, 1390/81 and 3795/81.

[134] *See* the discussion on the position of tourists under Community law in Chapter 2A, pp. 79-81.

[135] [1966] C.M.L.R. 82 at 94.

[136] Article 223(1)(b).

[137] Article 224.

[138] Article 225, last sentence.

[139] The Treaty Instituting the Benelux Economic Union, 1962, *U.N.T.S.* 260.

[140] Co. Dir. 68/360, art. 11 and Co. Reg. 1612/68, art. 42(1) contain express provisions to this effect.

[141] *See* Smit and Herzog, op. cit., I, p. 2-522.

[142] As the German Constitutional Court remarked in *Internationale Handelsgesellschaft* (Germany), nothing in the operation of the Treaty rules so far has violated fundamental rights. The possibility of such a violation does, however, exist.

[143] The Commission suggested such a move (E.C. Bulletin [1979], Supp. No. 2) but the Community has not acted upon the suggestion. Part of the problem has been the ambivalent attitude on the part of some Member States, notably France, towards the Convention - *see* Pierre Pescatore, "Droit Communautaire et Droit National," (1965), *Semaine de Bruges*, p. 326.

[144] [1970] C.M.L.R. 112 at 119.

[145] [1972] C.M.L.R. 255 at 283.

[146] Ibid.

[147] Ibid.

[148] [1972] C.M.L.R. 177.

[149] [1974] 1 C.M.L.R. 540 at 551.

[150] [1974] 2 C.M.L.R. 540 at 563.

[151] *See* Gerd Rinck, "Civil Liberties and the Common Market," (1976), 21 *Juridicial Review*, 266 and Ulrich Scheuner, "Fundamental Rights in European Community Law and in National Constitutional Law," (1975), 12 *C.M.L. Rev.*, 190.

[152] Rinck, op. cit., p. 266; Scheuner, op. cit., p. 189.

[153] [1974] 2 C.M.L.R. 540 at 563-564.

[154] [1974] 2 C.M.L.R. 338 at 354.

[155] Reply to written question 545/75, 1975 O.J. C67, pp. 23-24.

[156] [1976] 1 C.M.L.R. 140 at 155.

[157] [1976] 2 C.M.L.R. 532 at 563.

[158] [1980] 3 C.M.L.R. 42 at 64.

[159] This article reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

"The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[160] E.C. Bulletin (1979), Supp. No. 2.

[161] *See* Andrew Z. Drzemczewski, "Fundamental Rights and the European Communities: Recent Developments," (1977), 2 *The Human Rights Review*, 80.

[162] [1979] 2 C.M.L.R. 229.

[163] This concern is expressed by Drzemczewski, op. cit. at p. 81 and by E.A. Alkema, "Comment on Confédération Française Démocratique du Travail Case," (1979), 16 *C.M.L. Rev.*, 502-503.

[164] Pierre Pescatore, "The Protection of Human Rights in the European Communities," (1972), 9 *C.M.L. Rev.*, 75-76.

[165] Scheuner, op. cit., p. 185.

[166] *See*, *supra*, p. 44.

CHAPTER TWO

THE RIGHTS OF ENTRY, RESIDENCE AND CORPORATE RECOGNITION

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CHAPTER 2A

THE RIGHT OF ENTRY

THE LEGISLATION

Treaty Provisions

Articles 48(1), (3); 52; 58; 59; 60; 66.

Secondary Legislation

Council Directive 68/360/EEC, issued pursuant to Article 49.

Council Directive 73/148/EEC, issued pursuant to Articles 54(2) and 63(2).

General Programmes

General Programme for the abolition of restrictions on freedom of establishment, issued pursuant to Article 54(1).

General Programme for the abolition of restrictions on freedom to provide services, issued pursuant to Article 63(1).

Comments

Articles 48, 52, 59 and 60, paragraph 3 are directly applicable and confer a directly effective right of entry that the national courts must enforce.[1] The two directives fulfil the subsidiary role of providing for the implementation by Member States of detailed rules that set out what this right means in practical terms by clarifying the obligations and powers of the national authorities.[2] This ensures the effective exercise of the right, for it is much easier for an aggrieved party to rely on specific national measures than on the more amorphous language of the Treaty. A Member State cannot seek to withhold this advantage by refusing to implement the directives, for this will result in their becoming directly effective.[3] The Treaty can also be relied on directly where the subsidiary legislation is inconsistent or inadequate.[4]

The two general programmes set out a non-binding plan of action[5] for the abolition of restrictions by the Council in the area of establishment and services. They have no legislative significance, but, in as much as they reflect the Council's interpretation of the operative provisions of the Treaty, they are useful as an interpretive aid where the language of the Treaty is unclear.[6]

Articles 58 and 66 of the Treaty extend freedom of establishment and the freedom to provide services respectively to companies and firms. The problems involving the movement of such entities are different from those facing natural persons in that they concern the recognition necessary to carry on business rather than the rights of entry and residence.[7] For this reason the subject is treated in a separate section of this chapter.

THE SUBSTANCE OF THE RIGHT

The Right To Entry and Its Concomitants

Most democratic countries freely permit the entry into their territory of foreign nationals, but they often make entry contingent upon the completion of various formalities and invariably reserve the right to refuse entry in accordance with national immigration procedures. Under E.E.C. law, by contrast, non-nationals have an absolute right of entry into another Member State, subject to the public policy exception and provided that they have the requisite work connection. This right is exercisable upon the presentation of a valid domestic identity card or passport;[8] no entry visas or equivalent documents may be required.[9]

The right of entry into another Member State is separate from the right to reside in that state, which requires the fulfilment of more onerous conditions.[10] Nevertheless, the right of entry would be worthless if it did not also entitle the entrant to remain in the host state for at least some period of time. There appears to be an informal agreement among the Member States, as recorded in the minutes of the Council meeting that adopted Directive 68/1360,[11] that this period should not be less than three months.[12] During this time the non-national, having no right of residence under Community law, is only allowed to remain on sufferance. This means that, like any other foreigner, he is subject to national legislation on the residence of aliens, except in so far as this legislation is so restrictive as to render worthless his right of entry.[13] This would be the case if the legislation were to place unreasonable conditions on residence, such as a daily reporting requirement, or if it were so framed as to enable a Member State to circumvent the provisions of Directive 64/221 regulating the use of the public policy exception contained in the Treaty.[14]

This directive does not apply to residence on sufferance, but it does to the right of entry,[15] and it would be absurd if this application could be avoided by the national authorities simply waiting the few minutes necessary for the entrant to pass through immigration control. However, the protection afforded by the directive can only extend to matters that bear on the non-national's right of entry; it cannot serve to exclude him from the application of national law that relates exclusively to the terms of his residence on sufferance. Thus, a previous criminal conviction that is not sufficient under the directive for a non-national to be refused entry cannot thereafter be used as a ground for terminating his subsequent residence on sufferance; but the commission of the same offence during this period of residence would entitle the host state to expel him. The directive has no application to the second situation, which is in no way connected with entry into the host state, and an expulsion on the basis of a criminal conviction cannot be considered overly restrictive. By the same token, reasonable restrictions on the movement of a non-national within the host state, which are invalid for non-nationals with a right of residence,[16] could probably be imposed in the case of residence on sufferance.

Another concomitant of the right of entry into the host state is the right to leave the state of origin. Contrary to popular opinion it is not only dictatorships that prohibit their nationals from travelling abroad. In many western countries the issuing of travel documents is a matter for executive discretion, and it is not unknown for them to be withdrawn or refused.[17] Accordingly, both directives guarantee the right to emigrate[18] and require national authorities to issue the necessary papers.[19] No exit visas or other formalities are permitted.[20]

Formalities

The extent to which national authorities may attach formalities to the exercise of the right of entry depends on the origin of these formalities and, in the case of exclusively national provisions, on their nature. It is necessary, therefore, to make the distinction between formalities that are imposed by national law alone and those that arise from the operation of Community law.

Under the personal mobility provisions of the Treaty, the right of entry is circumscribed by the requirement of a work connection and by the availability of the public policy exception. It is implicit in these limitations that the national authorities be permitted to adopt the necessary procedures for their enforcement. More specifically, the authorities must be able to obtain information from an incoming E.E.C. national on the purpose of his visit and on his health and previous conduct in order to establish whether he enjoys a right of entry at Community law.[21] This right to information and its accompanying formalities have been accepted, at least tacitly, by the Court of Justice. In _van Duyn_ (41/74) a Dutch national was refused entry into the United Kingdom on the basis of her intention to work for the Church of Scientology and her previous adherence to that organization. In upholding the refusal, the Court of Justice must be taken to have approved the formalities to which Miss van Duyn was subjected in order to elicit this information. Such an interpretation of the Court's attitude is also supported by its reference, on more than one occasion, to the possibility "in individual cases, _where there is sufficient justification_, of imposing restrictions on the exercise of a right derived directly from the Treaty."[22] With respect to the work connection, the Court has contented itself with emphasising that the personal mobility rights under the Treaty are available only "for the purposes intended by the Treaty,"[23] but the same principle applies here as for the public policy exception; it would be impossible to respect the Treaty's purposes without finding out what the non-national plans to do in the host state. The suggestion that such enforcement of the work connection is contrary to the Court's decision in Pieck (157/79) prohibiting "any formality for the purpose of granting leave to enter the territory of a member-State"[24] is unfounded. That case dealt with a purely national formality that had no basis in Community law, and its import should be restricted to that context.

The Court has been much more forthcoming on the question of formalities that are attached to the right of entry by exclusively national legislation on the control of aliens. They are invalid in as far as they permit Member States to set up "restrictions or obstacles to the entry into their territory of nationals of other Member States,"[25] but, as the Court makes clear in Watson and Belmann, they are not absolutely prohibited:

> By creating the principle of freedom of movement for persons and by conferring on any person falling within its ambit the right of access to the territory of the member-States, for the purposes intended by the Treaty, Community law has not excluded the power of member-States to adopt measures enabling the national authorities to have an exact knowledge of population movements affecting their territory.[26]

The crucial dividing-line between permissible and invalid national formalities is thus drawn between formalities that remain informational and those that place a restriction or obstacle on a non-national's right of entry. In Pieck (157/79) the Court of Justice indicated that this line is crossed to the detriment of the national formality when the right of entry is made subject to the fulfilment of the formality, for "the right of Community workers to enter the territory of a member-State which

Community law confers may not be made subject to the issue of a clearance to this effect by the authorities of that member-State."[27] The Court went on to declare that an invalid national formality violates the specific prohibition contained in Article 3(2) of Directive 68/360 on entry visas and equivalent documents, which cover "any formality for the purpose of granting leave to enter the territory of a member-State...."[28] In the Pieck case (157/79) itself the formality at issue was an endorsement in the passport of a returning Dutch resident of the United Kingdom giving him leave to remain in the host state for six months. In view of the Dutchman's right of residence in the United Kingdom, the endorsement clearly restricted his rights under Community law and was invalid.[29] The Court did not therefore have to consider whether such an endorsement would have been valid in the case of a mere entrant. However, its general remarks do deal with this situation and suggest that, as long as the endorsement had not purported to confer the right of entry, which was by no means clear, it would have been permissible under Community law.[30]

The Court has also taken a clear stand on the question of sanctions for non-compliance with valid formalities. They are acceptable where they are proportionate to the gravity of the offence and do not result in the withdrawal of a Community right.[31] This would include reasonable fines but would exclude incarceration or a refusal to allow the non-national to enter the Member-State.[32]

Residence on sufferance, which is a concomitant of the right of entry, is regulated exclusively by national law including all the formalities and sanctions for non-compliance that this entails.[33] The only restrictions on this national autonomy are that the legislation be not so restrictive as to render worthless the right of entry and not operate so as to circumvent Directive 64/221 on the public policy exception.

THE SCOPE OF THE RIGHT

The Necessity for a Work Connection

The economic scope of the personal mobility provisions of the Treaty affect particularly the rights of entry and residence, for it is at this stage of free movement that the economic limitation must be enforced. The rights to pursue a livelihood and to equal treatment will only arise once the non-national has already installed himself in the host state.

The Treaty itself appears to take a very narrow view of economic activity by tying the right of entry to a pre-existing offer of employment[34] or to an immediate commitment to perform services[35] or establish oneself.[36] This view has, however, been expanded by the Council in its legislation with the approval of the Court of Justice, which is prepared to accept the mere desire to work or pursue self-employed activities as a basis for entry.[37] As long as the Council's secondary legislation retains this subjective link with employment, it is within the Court's interpretation of the Treaty.

There is no problem with the wording of Directive 73/148 on the free movement of self-employed persons. The right to entry upon the production of valid travel papers is limited under Article 3 to the persons referred to in Article 1, namely, E.E.C. nationals "who _wish_ to establish themselves in another Member State...or, who _wish_ to provide services in that State" and those "_wishing_ to go to another Member State as recipients of services."[38] The national authorities are allowed to enforce this limitation by verifying whether a person comes within one of the three categories, without contravening the prohibition in Article 3 on formalities beyond the requirement of valid travel documents.[39]

However, while it may be possible to ascertain whether an intended activity comes within the meaning of establishment or services, it is quite a different matter to attempt to verify the authenticity of the wish to establish oneself or to provide or receive services. Yet some form of control is necessary if the directive is not to permit a complete freedom of movement inconsistent with the scope of the Treaty. From this viewpoint it would seem not only permissible for national authorities to make the appropriate enquiries of prospective entrants but encumbent upon them to do so and to refuse entry as of right under Article 3 where the evidence warrants such a step.[40] For example, the authorities of a Member State can and should require evidence of medical qualifications from a person claiming to wish to set up a medical practice in the host state; and such person should be refused the benefit of Article 3 if he cannot comply. On the other hand, the authorities cannot enquire into the validity in the host state of these domestic qualifications, for Article 1(1) of the Directive refers only to the necessity for a subjective intent and makes no mention of the objective feasability of the wish. By the same token, a person should not be refused entry on the ground that his intended activity may involve public service or the exercise of official authority and hence be excluded from the operation of the Treaty.[41] As long as a prospective entrant evinces a realistic intention to do something that comes within the definition of establishment or services, that is sufficient.[42]

Directive 68/360 appears to circumvent these problems by according a right of entry upon presentation of a valid identity card or passport to all E.E.C. nationals.[43] In a way this is a very practical approach as anyone can claim to be looking for employment, but it nonetheless grants a greater freedom of movement than is permitted by the Treaty by not linking the right of entry to at least a desire to work. It would, for example, enable a person who has just been refused entry under Directive 73/148 to turn around and claim the right under Directive 68/360. The solution is to reject the terms of the directive out of hand as inconsistent with the Treaty, or to interpret the scope of Article 1, which defines the beneficiaries of the right of entry as "nationals of the Member States," in light of the directive as a whole. Both the title of the directive with its reference to "workers" and the Preamble, which indicates that the directive is adopted with respect to "nationals...who are moving to pursue a wage-earning occupation,"[44] could be used to justify restricting the application of Article 1 to E.E.C. nationals with a work connection. Whichever approach is taken, it must leave the national authorities with the power to ensure that only those persons entitled under Article 48 of the Treaty enter as of right.[45]

While Article 1 of Directive 68/360 is too broad, Article 2(1) is too narrow for it restricts the right of exit to those persons who have an actual offer of employment in the host state.[46] Given that the Treaty has been interpreted to permit entry as of right to those seeking employment, Article 2(1) is inconsistent; the right to exit must be co-extensive with the right to entry. Thus, an aggrieved party could rely directly on the Treaty, were a Member State to act according to Article 2(1) of the directive.

The Definition of a Work Connection

Employment. Subparagraphs (a) and (b) of Article 48(3) have the effect of limiting the right of entry to persons[47] who seek or take employment with an employer in the host state. This includes employees who accompany their employer when he moves to establish himself in another Member State, but it excludes persons who work in one state under a contract of employment with an employer in a different state. This is a strange omission, as the situation of people working elsewhere in the Community for a domestic employer is a common enough occurrence to warrant special social security arrangements.[48]

Some of the persons excluded by Article 48(3) of the Treaty are covered by paragraph three of Article 60, for the right of self-employed persons to enter another Member State in order to provide services necessarily implies the right to be assisted by their employees or, indeed, to have them carry out the task in their stead.[49] Accordingly, Directive 68/360 on the free movement of workers includes within its ambit all employees of providers of services regardless of the Member State where the latter are established.[50] This extends the right of entry to a variety of persons, such as lawyers, doctors and other professionals, salesmen, mechanics, insurance agents and so on, but it still leaves many people outside the scope of EEC personal mobility law with no right of entry. One example is that given by Wyatt and Dashwood of a British camera crew filming in France for their British employer; they are not working pursuant to a contract with a French employer, nor are they providing any services on behalf of their domestic employer to a resident of France.[51]

A possible solution is to base the crew's right of entry on the "freedom of movement for workers...within the Community" secured by Article 48(1), for it surely flows from this general concept of labour mobility that an employee be able to pursue his activities in other Member States and that his employer be permitted to send him there. Certainly the wording of Article 3(1) of Council Directive 68/360 is broad enough to permit entry on this basis, as the film crew would qualify under Article 1 of the Directive as E.E.C. nationals. This approach requires Article 48(3) to be treated as only an illustration of one facet of workers' mobility instead of an exhaustive definition, but this is not novel. The Court of Justice has

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already reduced Article 48(2) to an illustrative role by enlarging the scope of equal treatment beyond its narrow confines to cover all aspects of a worker's life in the host country.[52] There is no reason why the same cannot be done with Article 48(3).[53]

As far as the nature of the actual employment is concerned, an English metropolitan magistrate has taken the view in Secchi (U.K.) that casual work is insufficient to bring a person within the scope of the Treaty. Although the Court of Justice has not yet ruled on the matter, the English decision probably states the Community law position correctly; the terms "worker" and "employed person" in the Treaty and the secondary legislation do suggest a more serious commitment to employment than the occasional stint as a dishwasher in various restaurants, which was Mr. Secchi's work record. It is a moot point, however, whether it should be left to the immigration authorities at the point of entry to make a judgment on whether or not the employment intentions of a prospective entrant bring him within the Treaty provisions. Theoretically they should have this power as a complement to their authority to refuse entry in appropriate cases, but the possibilities for abuse are obvious.

Establishment. The right of entry under Article 52 of the Treaty, as implemented by Directive 73/148, is predicated on the wish to establish oneself in the host state. In the Treaty establishment is said to include both the taking up and pursuit of self-employed activities and the setting up and management of undertakings.[54] Directive 73/148, however, in setting out the rules for the exercise of the Treaty right to entry, refers only to the wish "to pursue activities as self-employed persons."[55] Whether or not this is an intentional limitation of the Treaty right is not clear, but, if it is, the directive is inconsistent with Article 52, which can be relied on directly to correct the inadequacy.

The use of the term "establishment" in both Directive 73/148 and Article 52 implies that a self-employed person must exhibit some permanence in his attachment to the host state. A freelance camera crew who wish to go to another member State to do some filming and then return home would not qualify for a right of entry under Article 1 of the directive or under the Treaty. This is an unfortunate gap in the personal mobility scheme of the Treaty, for, as with workers, the incidence of self-employed persons' wishing to pursue their activities abroad on a temporary basis also warrants special social security arrangements.[56] Unlike Article 48, Article 52 does not include a more broadly-based paragraph that could be used to override this limitation.

The position of persons who enter another member State in order to investigate the possibilities of setting up business is interesting. Although the permanence of their attachment is uncertain and prospective, it may well be enough to bring them within Article 1(1)(a) of Directive 73/148 as persons wishing to establish themselves. The Council directives on the freedom to provide services certainly accord a right of entry for providers to pursue "the various preliminary operations necessary for the performance of the service provided," including "advertising, canvassing and the conclusion of contracts."[57] There would seem to be no reason for different treatment in the case of establishment, as such exploratory missions, being an essential prerequisite for the prudent businessman, flow as logically from Article 52 as they evidently do from Article 59.

Although temporary activity in another Member State is not covered by Community law, Article 52 does not require an exclusive attachment to the host state. Provided that the person concerned is already established in a Member State, the Treaty gives him the right to set up subsidiaries, agencies or branches elsewhere in the Community.[58] Neither the Treaty nor the directive, which is altogether very non-commital on this point, provide criteria for deciding what qualifies as an already existing establishment. In the case of companies the general programme on establishment suggests as sufficient the presence in a Member State of their main establishment or centre of administration, or the existence of a "real and continuous link with the economy of a Member State."[59] This is no reason why the same criteria should not be applied to self-employed individuals. Although the general programmes are not binding, they reflect the Council's view of the Treaty and have been accepted by the Court of Justice as providing "useful guidance" in situations where the Treaty and its subsidiary legislation are as unhelpful as here.[60]

Services. Exactly who is to be considered a provider of services entitled to a right of entry under Community law is by no means clear. The first problem relates to the location of the recipient of these services. Paragraph one of Article 59 of the Treaty abolishes restrictions on the provision of services only in respect of providers who are established in a state of the Community "other than that of the person for whom the services are intended,"[61] and this limitation seems to have been interpreted by the Council in its directives implementing Articles 59 and 60 to mean that the recipient must reside in the country where the services are provided.[62] In either case there is a considerable restriction on who can be considered a provider. The language of Article 59 would exclude a person established in Member State A who is providing services, such as designing a house, in Member State B for a recipient in Member State A; while, under the directives, all providers would apparently be excluded except those who are designing the house for a person who is actually a resident of Member State B.

These limitations do not make any sense. In the case of the directives, the exclusion of all recipients other than those who reside in the state where the services are being provided clearly goes beyond the limitation contained in Article 59 and can be disregarded as inconsistent with the Treaty. But this still leaves the restrictive wording of Article 59. In the cases on services that have come before the Court of Justice, the location of the recipient has not been an issue, but some importance can perhaps be attached to the Court's repeated insistence on the need for the provider to be established in a Member State other than that to which the services are provided.[63] This could be an indication that the Court regards Article 59 as requiring only that the location of the receipt of the services, not that of the recipient, be a Member State other than that where the provider is established. This would be a logical requirement as, unless the services are destined for another Member State, they would remain a purely internal matter outside the scope of Community law.[64] Significantly the Council's subsidiary legislation on the right of entry is perfectly in keeping with such an interpretation of Article 59, for it contains no stipulation as to the location of the recipient.[65]

The second problem concerns the gap that is created within the personal mobility scheme of the Treaty by the exclusion of employees who do not work for employers established in the host state and of self-employed persons who wish to pursue their activities in another Member State on a temporary basis.[66] While the employees could possibly be accomodated by basing their right of entry on Article 48(1) of the Treaty, Article 52 admits of no similar accomodation for temporary establishments. Several scholars have proposed bridging this gap by extending the definition of services to cover all economic activity by a non-national in another Member State that does not fall within the ambit of Articles 48 to 58.[67] The basis for such an extension is the broad definition of services contained in the first paragraph of Article 60:[68]

> Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for renumeration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

But this language is, at best, ambiguous, for the final clause could more easily be read to exclude services that are dealt with elsewhere in the Treaty than to include economic activity that does not fall within the common meaning of services.[69] And this common meaning implies an immediate recipient of the service, not someone who may ultimately benefit from the economic activity either as a remote user of a service or as a consumer.[70] Moreover, if Article 59 is to be regarded as the governing article on the freedom to provide services, as it would seem to be, it leaves no room for such a liberal interpretation of this paragraph in Article 60. It is suggested therefore that the gap will have to remain, at least with respect to temporary establishments, unless the Court of Justice comes to the rescue.

Article 1(1)(b) of Directive 73/148 also accords a right of entry to the recipients of services. This represents a gloss on Articles 59 and 60 of the Treaty, and both its scope and its consistency with the Treaty came under discussion in Watson and Belmann (118/75). The case concerned an Englishwoman who had entered Italy and been charged with failure to comply with an Italian requirement that she register with the authorities within three days of her arrival. Both the substance of the formality and the sanctions attached to non-compliance, which included deportation, were referred to the Court of Justice as possibly contravening Community law. It was not clear from the facts before the Court whether Miss Watson had gone to Italy as a tourist or as a provider of services. However, the Commission argued that even as a tourist Miss Watson was protected by Community law, for tourists were to be considered the recipients of the tourist industry of the host state. Advocate-General Trabucchi, while he accepted the extension of the right of entry to recipients of services, strenuously opposed the inclusion of tourists in this category. He took the position that the free movement of recipients of services must be "indissolubly linked with the right to movement of those who have to provide those services."[71] In other words, the right of entry should be reserved for the recipient of services that could have been provided to that recipient by the same provider in the former's home state. This would exclude tourists, as the tourist industry is, by definition, inextricably linked to the home state of the provider. Beyond a tacit confirmation that the recipients of services do indeed have a right of entry, the Court of Justice offered no further guidance.[72]

The Commission's broader view is undoubtedly the more popular.[73] But, even though Trabucchi's approach would exclude an appreciable sector of the economy from the field of personal mobility,[74] it should be remembered that the right of entry of recipients of services must ultimately be based on the Treaty. Neither Article 59 nor Article 60 confer upon them an autonomous right of entry, and it is reasonable to suggest, as Trabucchi does, that the secondary legislation cannot make good this lack; the right of entry of recipients must be linked to that of the provider of the services. Moreover, the practical effect of extending the personal mobility provisions of the Treaty to tourists would be to effect a total freedom of movement within the Community, for, again in the words of the Advocate-General, "everyone is actually or potentially a recipient of services."[75] And such total freedom of movement is inconsistent with the whole concept of economic personal mobility that the Treaty espouses.[76]

The Question of Nationality

Non-E.E.C. Nationals. The right of entry for persons wishing to establish themselves or provide services in another Member State is restricted to E.E.C. nationals by both the Treaty[77] and the subsidiary Community legislation.[78] The second paragraph of Article 59 provides for the extension by the Council of the freedom to provide services to nationals of third countries, but no action in this respect has been forthcoming.

The position of recipients of services is more complex. In principle the nationality of the recipient should be irrelevant, for it is the freedom to provide the services that is guaranteed by the Treaty.[79] And as long as it is the provider who travels to another Member State, no problems will arise in the case of a foreign recipient.[80] However, Article 1(1)(b) of Directive 73/148 only extends a right of entry to persons travelling to receive services who are E.E.C. nationals. It could be argued that, provided the foreign recipient is resident within the Community, this constitutes an unnecessary restriction on the rights of providers under the Treaty. On the other hand, the difficulty of enforcing this residency requirement might well open up the right of entry beyond the confines of the Community, and this possibility could be used to justify the restriction imposed by the directive.

The right of entry of persons seeking or taking employment by contrast, is not expressly limited in the Treaty to E.E.C. nationals. Article 48(1) refers to "freedom of movement for workers" while Article 48(3) is silent on the point and Article 48(2) is ambiguous.[81] The issue is whether the term "workers" is intended to have the limiting effect of excluding self-employed persons from the ambit of the article, or whether it is meant to extend freedom of movement to all workers resident within the Community regardless of nationality. The insistence on the European character of the Community in the Preamble[82] and the limitation of free movement to the Member States in Article 3(c), which sets out the scope of the Treaty, would indicate that the term does have a limiting effect. The Council's view, as expressed in Directive 68/360, has been to restrict the right of entry to nationals of the Member States.[83] This would seem to be the better view for the reasons stated above and also bearing in mind the Declaration of the Member States of March 25th, 1964, which obliged them only to view "with particular favour" the entry of foreign refugees and stateless persons resident in other Member States of the Community.[84]

A problem arises with regard to the employees of persons who establish themselves or provide services in another Member State. As long as these employees are E.E.C. nationals they benefit from the Community rules on freedom of movement and may enter the host state under the terms of Directive 68/360. Article 54(3)(f), however, recognizes that the right of establishment must also entail the right to dispose of managerial and supervisory personnel regardless of nationality;[85] there is little point in being able to set up abroad if the necessary manpower cannot be transferred. The same right must also accrue to the providers of services, who should be allowed to use personnel whose skills or position make them indispensable. Although the Treaty makes no similar provision in this case, the right flows from the freedom to provide services accorded by Articles 59 and 60. This fact seems to find recognition in Title II of the General Programme on services, for the mention of the right of entry of "staff possessing special skills or holding positions of responsibility" is pointless unless it refers to non-E.E.C. nationals. The problem is that there is no provision in Directive 68/360 for a right of entry of such personnel where they are not E.E.C. nationals. They may, of course, be admitted on sufferance like other non-E.E.C. nationals, but as their employers have a right to their services under the Treaty, this is not sufficient. The solution is surely that they have a right of entry based directly on the Treaty rights of their employers, which may be exercised in the same way as that of non-national family members; the host state may require entry visas but it must afford every facility for obtaining them.[86]

Domestic Nationals. Domestic nationals will rarely need the protection of Community law to enter their own country, but it is available to them as long as they have severed their connection with their home state.[87] This was not the case with the domestic national in Saunders (175/78), who had been bound over by an English court following her conviction for theft and had undertaken not to set foot in England or Wales for three years. She broke that undertaking and was brought before the court again, which referred the validity of the undertaking it had imposed to the Court of Justice. The Court took the view that this was a purely internal matter that fell outside the scope of the Treaty, as there was no factor connecting it to "any of the situations envisaged by Community law."[88]

FOOTNOTES

CHAPTER 2A

[1] See Royer, 48/75, [1976] 2 C.M.L.R. 619 at 636-638; Watson and Belmann, 118/75, [1976] 2 C.M.L.R. 552 at 570; Pieck, 157/79, [1980] 3 C.M.L.R. 220 at 239. See, too, the discussion in Chapter 1, pp. 19-21.

[2] See Chapter 1, pp. 24-25.

[3] See Chapter 1, pp. 17-18 and Pieck (157/79). For the sake of simplicity, reference is made throughout the study to the provisions of directives rather than to the national implementing measures, which must, in any case, conform to these provisions in order to be effective.

[4] See Chapter 1, pp. 25-26 and in particular Royer (48/75).

[5] See Chapter 1, fn. 33.

[6] For example, see infra, pp. 82-83.

[7] Note that Directive 73/148 does not mention companies or firms.

[8] Art. 3(1) of both Directives 68/360 and 73/148.

[9] Art. 3(2) of both Directives 68/360 and 73/148. A Member State may require a family member who is not an E.E.C. national to acquire an entry visa. Family rights are discussed in Chapter 4D.

[10] See Chapter 2B, pp. 107-108.

[11] This information is provided by Smit and Herzog, The Law of the European Economic Community, I (New York: Matthew Bender, 1976-1982), p. 2-467, and referred to as well by T.C. Hartley, "The Internal Personal Scope of the EEC Immigration Provisions," (1978), 3 European Law Review, 192.

[12] This agreement is reflected in Article 69(1)(c) of Regulation 1408/71, which permits a worker in search of employment in another Member State to continue to receive his unemployment benefits for a period of three months. The U.K. Immigration Rules are more generous and impose a maximum period of six months - Rule 51, Halsbury's Statutes of England, (3rd ed.), 42A, p. 773.

[13] For a discussion of the entrant's right to equal treatment in the host state, see Chapter 4E, pp. 440-444.

[14] Articles 48(3) and 56. This exception is discussed in Chapter 2D.

[15] Co. Dir. 64/221, Art. 2(1).

[16] *See Rutili* (36/75), where the Court of Justice declared invalid a condition placed by France on an Italian resident as of right that he not enter certain *départements*.

[17] In the United Kingdom, for example, the issue of passports has always come under the royal prerogative - *see* David W. Williams, "British Passports and the Right to Travel," (1974), 23 *I.C.L.Q.*, 642.

[18] Art. 2(1) of both Directives 64/360 and 73/148.

[19] Art. 2(2) and (3) of both Directives 68/360 and 73/148.

[20] Art. 2(4) in both directives prohibits the requirement of exit visas or equivalent documents. This prohibition is reinforced by Art. 2(1), which declares that the right to emigrate "shall be exercised simply upon presentation of a valid identity card or passport."

[21] This view is also expressed by Derrick Wyatt, "Article 48: Permissible Entry Formalities for Nationals of Member States," (1980), 5 *European Law Review*, 384-386, and T.C. Hartley, op. cit., p. 192.

[22] *Royer*, 48/75, [1976] 2 C.M.L.R. 619 at 638; *Pieck*, 157/79, [1980] 3 C.M.L.R. 220 at 240.

[23] *See Watson and Belmann*, 118/75, [1976] 2 C.M.L.R. 552 at 571.

[24] [1980] 3 C.M.L.R. 220 at 240, 242. *See* Wyatt, op. cit., pp. 384-387.

[25] *Watson and Belmann*, 118/75, [1976] 2 C.M.L.R. 552 at 570. *See*, too, *Royer*, 48/75, [1976] 2 C.M.L.R. 619 at 639-640.

[26] [1976] 2 C.M.L.R. 552 at 571. *See*, too, *Royer*, 48/75, [1976] 2 C.M.L.R. 619 at 639-640.

[27] [1980] 3 C.M.L.R. 220 at 240.

[28] Ibid.

[29] It was also contrary to Rule 51 of the U.K. Immigration Rules: "When an EEC national is given leave to enter, no condition is to be imposed restricting his employment or occupation in the United Kingdom. Admission should normally be for a period of 6 months, *except in the case of a returning resident* or the holder of a valid residence permit" (emphasis added).

[30] This is also the view expressed by Wyatt, op. cit., at p. 387.

[31] *See Royer*, 48/75, [1976] 2 C.M.L.R. 619 at 640; *Watson and Belmann*, 118/75, [1976] 2 C.M.L.R. 552 at 572.

[32] *See Pieck*, 157/79, [1980] 3 C.M.L.R. 220 at 241-242.

[33] *See*, *supra*, pp. 66-67.

[34] Article 48(3)(a).

[35] Article 60, para. 3.

[36] Article 52.

[37] See the discussion in Chapter 1, pp. 7-8.

[38] Articles 1(1)(a) and (b) (emphasis added). The addition of recipients of services is another gloss on the Treaty that the Court has accepted - *see* Chapter 1, p. 8 and *infra*, p. 80.

[39] *See supra*, pp. 69-70.

[40] *See* the decision of the Wiesbaden Landgericht in *Barulli* (Germany), where the Court rejected the sufficiency of a personal declaration and declared that "the objective circumstances must decide the matter" [1968] C.M.L.R. 234 at 246.

[41] *See* Articles 48(4) and 55.

[42] *See* the following comment from Hartley, op. cit., at p. 192: "In practice the question of proof is likely to be important. If the immigration authorities of the country of immigration adopted too strict an attitude, the whole purpose of the Community provisions would be jeopardised. Therefore, if the immigrant states his purpose is to look for work, this should be accepted under there is positive evidence to the contrary."

[43] This is the combined effect of Articles 1 and 3.

[44] 1st recital (emphasis added).

[45] The U.K. authorities have certainly taken this power. Paragraph 52 of the Immigration rules reads: "An EEC national who wishes to enter the United Kingdom *in order to take or seek employment*...is to be admitted without a work permit or other prior consent" (emphasis is added).

[46] Article 2(1) refers to the right to leave "in order to *accept and pursue* a wage-earning activity" (emphasis is added). *Cf*. Directive 73/148, Art. 2(1), which grants the right of exit to all persons with a right to enter the host state.

[47] The term "worker" in the Treaty includes managerial and supervisory personnel - see Article 54(3)(f). In Regulation 1390/81, amending Regulation 1408/71 on social security, the term is replaced by the more comprehensive words "employed person." As the Court of Justice points out in *Unger*, 75/63, [1964] C.M.L.R. 319 at 330, Community law governs who is covered by the provisions of the Treaty.

[48] See Regulation 1408/71, Art. 14(1), as amended by Regulation 1390/81. It is, however, possible that this provision is only intended to cover the employees of providers of services - see fn. 56.

[49] The condition set out in Title I of the General Programme on services that the services be carried out personally or by agencies or branches established in the host state is inconsistent with this implied right. It is also quite unrealistic, as companies, which also benefit from the freedom to provide services, have to use employees to perform services. The Council directives implementing the general programmes sensibly disregard this provision in Title I and expressly refer to employees acting on their employer's behalf - see the Preambles to Directives 65/1, 6th recital; 68/363, 15th recital; 74/557, 7th recital.

[50] Articles 6(3) and 8(1)(a).

[51] Derrick Wyatt and Alan Dashwood, The Substantive Law of the EEC (London: Sweet and Maxwell, 1980), pp. 126-127. See, also, the references to this example in Chapter 1, pp. 27-28 and the discussion, infra, on pp. 76-77.

[52] See the discussion in Chapter 1, pp. 33-35.

[53] It is significant that the Council directives on self-employed activities consider that the position of paid employees accompanying a person providing services or acting on his behalf is governed by Articles 48 and 49 of the Treaty - see Directives 65/1, Preamble, 6th recital; 68/363, Preamble, 15th recital; 74/557, Preamble, 7th recital. This is only possible if Article 48(3) is subordinated to Article 48(1).

[54] Article 52, para. 2.

[55] Article 1(1)(a).

[56] Regulation 1408/71, art. 14a(1), as amended by Regulation 1340/81. It is, however, possible that this provision is intended to cover only providers of services - see fn. 48.

[57] See Co. Dirs. 65/1, art. 3(1); 67/654, art. 4(1).

[58] Article 52, paragraph 1. A subsidiary is an independent legal entity formed in accordance with the law of the host state. Both an agency and a branch are an extension of the domestic establishment, but a branch has a greater degree of autonomy.

[59] General Programme on establishment, Title I.

[60] Thieffry, 71/76, [1977] 2 C.M.L.R. 373 at 402.

[61] Emphasis added.

[62] See Co. Dirs. 65/1, art. 3(2); 67/654, art. 4(2).

[63] *See* the discussion of the Court's attitude in P. Leleux, "Recent Decisions of the Court of Justice in the Field of Free Movement of Persons and Free Supply of Services," *European Law and the Individual*, ed. F.G. Jacobs (Amsterdam/New York/Oxford: North Holland Publishing Company, 1976), p. 84.

[64] *See Debauve* (52/79).

[65] Co. Dirs. 68/360, art. 6(3); 73/148, art. 1(1)(a) and 4(2). *See*, too, Title I of the General Programme on services.

[66] *See* also the discussion in Chapter 1, pp. 28-29 and fn. 90 of that chapter.

[67] *See* Wyatt and Dashwood, op. cit., p. 183; Hartley, op. cit., p. 205; Cesare Maestripieri, "Freedom of Establishment and Freedom to Supply Services," (1973), 10 *C.M.L. Rev*. 151.

[68] This is suggested by Maestripieri, op. cit., p. 151.

[69] *See* Hartley, op. cit., p. 205.

[70] *See* Wyatt and Dashwood, op. cit., at p. 133 who argue that the Treaty requires "the fullest possible freedom of movement for self-employed persons wishing to engage in economic activities, *regardless of the stage of production involved*" (emphasis added).

[71] [1976] 2 C.M.L.R. 552 at 560.

[72] The tacit confirmation can be inferred from the Court's general acceptance of the subsidiary legislation on free movement.

[73] It is shared by many scholars. *See*, for example, Wyatt and Dashwood, op. cit., p. 201 and Andrew Durand, "European Citizenship," (1979), 4 *European Law Review*, 5.

[74] This is the basis of Wyatt and Dashwood's reason for including tourists among the recipients of services - *see* Wyatt and Dashwood, op. cit., p. 201.

[75] [1976] 2 C.M.L.R. 52 at 559.

[76] *See* the discussion in Chapter 1, pp. 6-10.

[77] Articles 52 and 59 both apply only to E.E.C. nationals.

[78] Directive 73/148, art. 1. The position of family members who do not possess the nationality of a Member State is discussed in Chapter 4D, p. 415.

[79] This is the view taken by Leleux, op. cit., at p. 84 and K. Lipstein, *The Law of the European Economic Community* (London: Butterworths, 1974), at p. 61.

[80] See supra, p. 71.

[81] It uses the expression "workers of the Member States" which could mean either residents or nationals of those states. The ambiguity is underlined by the fact that Smit and Herzog, op. cit., at I. pp. 2-467/468 consider that it excludes foreigners, while Lipstein, op. cit., at p. 85 suggests that it might include them.

[82] See the 1st, 2nd, 3rd, 7th, 8th, and 9th recitals.

[83] See the Preamble, 1st and 2nd recitals, and Articles 1 and 3.

[84] 1964 J.O. 78, p. 1225.

[85] The question of nationality is not expressly mentioned, but there is no reason for the provision if it does not refer to non-E.E.C. nationals. See, too, Title III A, para. 4 of the General Programme on establishment, which incorporates the wording of Article 54(3)(f).

[86] Directive 68/360, art. 3(2).

[87] See Chapter 1, pp. 32-34.

[88] [1979] 2 C.M.L.R. 216 at 227.

Chapter 2B

THE RIGHT OF RESIDENCE

THE LEGISLATION

Treaty Provisions

Articles 48(1), (3); 52; 55; 59; 60; 66.

Secondary Legislation

Council Directive 68/360/EEC, issued pursuant to Article 49.

Commission Regulation 1251/70/EEC, issued pursuant to Article 48(3)(d).

Council Directive 73/148/EEC, issued pursuant to Articles 54(2) and 63(2).

Council Directive 75/34/EEC, issued pursuant to Article 235.

General Programmes

General Programme for the abolition of restrictions on freedom of establishment, issued pursuant to Article 54(1).

General Programme for the abolition of restrictions on freedom to provider services, issued pursuant to Article 63(1).

Comments

The direct effect of Articles 48, 52, 59 and 60, paragraph 3 confer, in addition to the right of entry, a right of residence enforceable by the national courts.[1] Article 48(3)(d) expressly includes in this right that of remaining in the host state after having been employed there, but this should not be interpreted as excluding self-employed persons who have established themselves in another Member State from enjoying the same benefit. The absence of such a right is as much an obstacle to freedom of establishment as it is to free movement of workers and would contravene Article 52 as well as Article 48.[2] The Council has recognized this fact and provided for the right to remain in another Member State after the cessation of self-employed activity in Directive 75/34,[3] although, out of excessive caution, it based the legislation on its residual powers under Article 235.[4]

As with the right of entry, the role of all the secondary legislation in this area is again limited to setting out detailed rules for the effective exercise of a Treaty right; and the Treaty can once more be relied on directly where these rules are not consistent or co-extensive with it.[5] The provisions of the secondary legislation are extremely precise and capable of direct effect in the absence of national implementation.[6] Commission Regulation 1251/70 is, by its legislative nature, directly applicable in addition to having direct effect so that it does not require any national measures.

The Council has chosen to administer the right of residence in most cases by way of the issuance of a residence permit to those E.E.C. nationals who fulfill certain prerequisites. This approach is perfectly acceptable as long as the prerequisites conform to the Treaty and, more importantly, provided that it is understood that the right to residence flows from the Treaty independently of the permit. The permit may be used as an administrative convenience to facilitate proof of the right to residence, but it cannot become the source of the right itself without conflict with the Treaty, which requires no such permit. This distinction was emphasised by the Court of Justice in Royer (48/75):

> It must therefore be concluded that this right [of residence] is acquired independently of the issue of a residence permit by the competent authority of a member-State. The grant of this permit is therefore to be regarded not as a measure giving rise to rights but as a measure by a member-State serving to prove the individual position of a national of another member-State with regard to provisions of Community law.[7]

Some articles in the secondary legislation make clear this distinction. The national authorities are required to issue the permit upon fulfilment of the prerequisites,[8] and the permit is accorded only evidentiary and not substantive status.[9] Article 5 of Directive 68/360 declares, in the same vein, that a delay in the issuance of the permit "may not interfere with the immediate performance of work contracts concluded by the applicants." Other provisions are misleading, such as those that define the time limits on the right of residence and the loss of the right in terms of the validity[10] and withdrawal[11] of the permit. This terminology suggests that a person can retain his right of residence in another Member State as long as or only if he continues to be in possession of a valid permit, whereas the real position is that he has a right of residence under the Treaty whenever he fulfills the conditions set out in the implementing legislation for its exercise. The mere absence of a residence permit cannot nullify this right. There are other similarly misleading provisions in the secondary legislation, and they will be discussed where they cause particular problems.

The non-binding, and now largely redundant, general programmes retain, as with the right of entry, some significance as an interpretive tool.

THE SUBSTANCE OF THE RIGHT

Introduction

The right of residence entitles a person to remain in another Member State with immunity from expulsion except for specific reasons that are set out in the implementing legislation[12] or on grounds of public policy.[13] The right may be of limited or unlimited duration depending on the nature of the person's business in the host state, but it must in all cases extend to the whole territory of that state.[14]

The position of a person with a right to residence is to be distinguished from that of a person who has gained entry into the host state but does not yet qualify for residence as of right. The latter will only be allowed to remain with the consent of the host state and according to the terms of its legislation, which may stipulate a maximum period of residence on sufferance and provide its own grounds of expulsion. The only limitation on this national autonomy is that the legislation not be so restrictive as to render worthless the right of entry as this would contravene the Treaty.[15]

The Types of Residence

The unlimited right of residence. An E.E.C. national[16] who has a contract of employment for one year or more with an employer in the host state, or who has established himself in order to pursue activities as a self-employed person, acquires a right of residence of unlimited duration in that state.[17] This right can only be lost if the foreign national commits a specific offence justifying his expulsion,[18] or if he fails to qualify for a continuation of the right of residence upon ending his working life.

In order to qualify for the continuation of the right of residence, a foreign national must fulfil one of two sets of criteria.[19] The first[20] is that he must have reached pensionable age according to the legislation of the host state,[21] having been in employment[22] there for the twelve months immediately preceding his retirement and having resided continuously in the host state for more than three years. Alternatively,[23] the non-national can also qualify if he has ceased work because of permanent incapacity, as long as the incapacity is the result of an accident at work or an occupational disease[24] or, failing that, provided that it occurs after at least two years' continuous residence in the host state. Involuntary unemployment or temporary absences from work due to illness or an accident are considered to constitute employment.[25] Thus, where a worker has been continuously resident but involuntarily unemployed in another Member State for five years and then reaches retirement age or is permanently incapacitated, he will still qualify for a continued right of residence.[26]

The requirement of continuous residence is met when the non-national is not absent from the host state in any given year for a total of more than three months.[27] Longer absences that are necessitated by the performance of obligatory military service do not count.[28] This method of calculation seems to suggest that continuous residence can only be reckoned in years, so that the expression "more than three (or two) years"[29] requires in practice at least four (or three) years' continuous residence. There is no indication in the secondary legislation whether the requirement must be met in the years immediately preceding the event that entitles a person to continuation of the right of residence. The silence on this point contrasts with the stated need for the employment requirement to be met in the twelve months prior to retirement,[30] which permits the conclusion that any period of continuous residence of the required duration will suffice.[31] The requirement is dropped completely where the spouse of the foreign national holds the citizenship of the host state or lost it only because of the marriage.[32]

The unlimited right to residence is evidenced by a residence permit that must be valid for at least five years and automatically renewable.[33] The host state is obliged to issue the permit when the right is initially acquired upon presentation of the travel document used to obtain entry and upon proof of employment or establishment for the purposes of employment.[34] No additional formalities may attend the continuation of the right to residence,[35] which may be claimed any time during the two years following the definitive cessation of employment.[36] This emphasises that it is merely the original right that is extended and not a new right that is created. Accordingly, it is attested by the same residence permit and is also subject to withdrawal upon the commission of an expellable offence.

The limited right of residence. Self-employed persons and their employees who provide services in another Member State or persons who travel to receive services, as well as employees with a contract of employment for less than a year with a foreign employer,[37] have a right of residence in the host state that is limited in duration to the period of the employment or provision of services.[38] Once the employment or services are completed, the right of residence expires.[39]

The formalities set out in the secondary legislation differ according to whether or not the stay exceeds three months. Where a person stays three months or less, he is entitled to rely as evidence of his right of residence on the document with which he entered the host state together with, in the case of employees, a declaration issued by the host employer or domestic provider indicating the expected period of employment.[40] This additional requirement for the employee means that the duration of the employment or services must be ascertained prior to commencement, which may not always be possible. All three categories of persons - providers, recipients and employees, - can be required to give notice of their presence in the host state to the authorities.[41]

If the performance of the service takes more than three months, or if the contract of employment with the host employer is for more than three months but less than a year, the foreign resident must obtain a document attesting his right of residence.[42] For the employee the document is a temporary residence permit, which he obtains by producing his travel papers and the declaration from his employer or provider stating the expected duration of the employment.[43] The self-employed provider and recipient of services must acquire a right of abode, for which purpose they require their travel papers and proof of the fact of the services.[44]

The temporary residence permit causes problems. In the first place it is impractical. It must be obtained at the commencement of the stay,[45] which requires the employer to estimate the length of employment with sufficient accuracy to determine whether a permit is necessary; otherwise, the employee could find himself after three months in need of a permit that he should already have acquired. The host authorities cannot refuse to issue the permit in these circumstances without impugning the employee's right of residence and hence contravening the Treaty,[46] but the potential for bureaucratic obfuscation is clear. The right of abode, on the other hand, need not be obtained until the stay exceeds three months, which avoids this unnecessary problem.[47]

Other provisions concerning the temporary residence permit are misleading. It is issued for a limited period which will not necessarily be co-extensive with the actual duration of the employment.[48] This is because the validity of the permit does not have to coincide with the expected length of employment and, even where it does, the employment may well last for a longer or shorter period. The question then arises as to the rights of the employee. It has been suggested that, where the permit expires too early, the employee must go through a process of re-application as Article 6(3) of Countil Directive 68/360 does not provide for an automatic renewal,[49] and that, where the permit outlasts the period of employment, the employee still retains his right of residence until the permit finally expires.[50] To accept this view of the rights of the employee is to fall into the same error as the drafters of the directive, namely that of ascribing substantive force to the permit. In order to be consistent with the Treaty, the right of residence must depend on the employment and not on the validity of the permit and be co-extensive only with the duration of that employment. Thus, the right of residence cannot continue after the end of the employment, and, conversely, the permit must be renewed automatically when it expires too early. Once again this problem is avoided by the right of abode, which is stated to be merely evidence of a right of residence that expires once the services are performed.[51]

It is possible to transfer a limited right of residence into an unlimited one. This can happen when a limited contract with a host employer is extended on a single occasion for a year or more, for the employee will now meet the prerequisite for unlimited residence. It will not happen where the total length of employment amounts to a year or more as a result of one or more extensions, as the employee will not be able to show on any occasion a contract of sufficient duration. A person providing services as a self-employed or employed person and recipients of services never qualify for an unlimited right of residence.[52]

Finally, there is the question whether the limitation in Directive 68/360 of the employee's right of residence to the duration of his contract with the host employer is compatible with the Treaty. Although the limitation does not run counter to the guarantee of continued residence contained in Article 48(3)(d), which can be legitimately restricted to long-term residents of the host state, it has been said to deprive the worker of the opportunity of seeking further employment in the host state that he should be accorded under the Treaty.[53] However, this criticism overlooks the distinction between the right of residence and residence on sufferance. It may well be incumbent upon the Member States to give the worker a chance to remain and find other work, but this does not mean that the Treaty requires him to be granted a right to residence. On the contrary, the Treaty clearly indicates that this right can be made dependent on actual employment.[54] All that the worker is entitled to demand under E.E.C. law is that he be allowed to reside on sufferance during his search for work, and the directive is not incompatible with such a right.

Frontier workers. Special arrangements are made in the legislation on residence for employed and self-employed persons who reside in one Member State and work in another. These arrangements concern the person's rights in both states.

A person may retain his right to residence in a Member State in which he is not also employed on two conditions.[55] He must have been continuously resident and employed in the state prior to taking up employment or self-employed activities in another state, and he must return to the state of residence daily or at least once a week.[56] As long as these two conditions are met, the right to residence is retained and the person is considered for all purposes to be employed within the state of residence. Accordingly, he is eligible for a continued right of residence on the basis of his employment in the other state,[57] and, conversely, he is liable for expulsion if he commits an expellable offence there.[58]

A necessary concomitant to this retention of rights in the state of residence is the entitlement of the frontier worker or self-employed person to a right of residence in the state of employment. An employed person is accorded such a right for the period of employment.[59] He needs no document to attest the right, although the state of employment may issue him a special card for the sake of convenience.[60] He may, however, be required to report his presence in the state to the authorities on the same conditions as short-term residents.[61] No similar provisions exist for self-employed persons, who, presumably, can obtain an unlimited right of residence in both states; the only alternative is to deny them the right of residing outside the state of employment, but this right is expressly granted them under Article 2(a)(c) of Directive 75/34. This anomolous situation is probably due to the erroneous assumption on the part of the draughtsmen that establishment must be total or not at all.[62]

Formalities

The formalities surrounding the exercise of the right of residence fall into the same two categories as those attached to the right of entry, namely formalities that arise from the operation of Community law and those emanating from exclusively national legislation.[63] The only difference is that the former are set out in the secondary legislation on residence instead of arising by implication as in the case of the right of entry.

Both Directive 68/360 on employees and Directive 73/148 on self-employed persons and recipients of services provide for the issue by the national authorities of residence permits of an initial duration of five years and automatically renewable as evidence of the unlimited right of residence[64] and of temporary permits[65] or a right of abode[66] as evidence of the limited right of residence. For non-nationals who remain in the host state for three months or less, the travel documents with which they entered the host state, together with a declaration from the employer in the case of employees setting out the expected duration of the employment, are sufficient to prove the limited right of residence.[67] In order to obtain either type of residence permit or a right of abode, the non-national is required to present the travel document with which he entered the host state and proof of employment, establishment or the provision or receipt of services, as the case may be.[68] The proof of employment must also contain an indication of the expected length of the period of employment.[69] Sanctions may be imposed by national authorities for failure to comply with these formalities, but they must not be disproportionate to the gravity of the offence or include the possibility of expulsion.[70]

The secondary legislation seems to require that the residence permits that the Member States are to issue under Community law be quite separate from the general residence permits that are issued to foreign nationals under exclusively national legislation on the control of aliens.[71] The Court of Justice, however, has taken a more liberal view and explicitly accepted that Community residence permits may be assimilated to these general permits[72] as long as the legislation in question provides for their automatic issuance to a non-national with a right of residence,[73] and as long as the scope of the general permit accords with the rights obtaining under Community law.[74] Neither condition was met in Pieck (137/79), where the unlimited right of residence of a Dutchman in the United Kingdom was attested by an endorsement on his passport that limited his residence to six months and was made at the discretion of the immigration authorities.

Purely national formalities that attach to the right of residence are permitted, as in the case of the right of entry, where they are purely informational[75] or aim at controlling the movement of aliens within a Member State.[76] They must not obstruct the free movement of persons or subject the exercise of the right of residence to their fulfilment.[77] In *Watson and Belmann* (118/75) an Englishwoman contested the validity of an Italian requirement that she register with the local public security authority within three days of her arrival in Italy, but the Court of Justice held that the period fixed for the discharge of this obligation was reasonable and did not unduly restrict her right of residence. Once again the Court's attitude seems more liberal than the secondary legislation, which only explicitly permits additional national formalities where the non-national is residing for three months or less in the host state and does not have to obtain a residence permit or right of abode.[78] Sanctions for non-compliance with national formalities must also be proportionate to the gravity of the offence and cannot entail the withdrawal of a Community right.[79] Incarceration and expulsion are unacceptable.[80]

The Grounds for Expulsion

General. The permissible grounds for expulsion are set out in the secondary legislation. They are drafted in such a way as to permit but not to require the withdrawal of the right to residence when the criteria are met. With the exception of the public policy exception, which is treated in a separate section of this chapter,[81] they are based on the need for the non-national resident to retain a sufficient residential and employment connection with the host state. This general criterion does not create any fundamental conflict with the Treaty, although there are problems with some of the detailed rules. It should also be noted that the secondary legislation deals with expulsion in terms of the withdrawal of the residence permit,[82] which again creates the impression that the permit is the source of the substantive right. This is, of course, erroneous, as it is the right of residence that is withdrawn, whereupon the permit, whether it is withdrawn or not, ceases to have any significance.

Absence from the host state. The right of residence[83] may always be lost if the foreign national is absent from the host state for more than six consecutive months.[84] An exception is made for absences of any length necessitated by the obligations of foreign military service. This is a very limited exception and no consideration is given to other reasons which may cause a person to remain away from his normal residence for longer than six months. Examples would be a university professor whose research requires a prolonged absence, or a sick person who has to remain abroad for extended medical treatment.[85] To withdraw the right of residence in these circumstances would be an act of discrimination, for it denies benefits to non-nationals that are readily available to the native population. Thus, it is suggested that although the ground itself is unobjectionable, its scope is cast too widely and infringes the right to free movement that flows from the Treaty. The discrimination that it causes could be remedied by direct recourse to the operative provisions of the Treaty.

Although a non-national resident can retain his right of residence even after an absence of six consecutive months, he will not qualify for continuous residence under Article 4(1) of both Directive 75/34 and Regulation 1251/70 if his total absence in any year amounts to more than three months.[86] This discrepancy means that a person may not be able to obtain a continuation of his right to residence upon ceasing work even though he has never placed the right itself in jeopardy. For example, if a person resides and works in another Member State for twenty years and takes a four month holiday every year in his state of origin, as he is entitled to do without losing his right of residence, he cannot remain in the host state upon his retirement or permanent incapacity because he does not fulfil the necessary continuous residence requirements.[87] Nor would this person be able to retain his right of residence if he were to go and work in another state during the week, as frontier workers also need a period of continuous residence in order to qualify as such.[88]

There does not appear to be any good reason for this anomalous situation, which, by bringing an otherwise valid right of residence to a premature end, creates an obstacle to personal mobility. This is an example of rules that are designed to facilitate the exercise of a Treaty right in fact narrowing its scope, and the person who is disadvantaged thereby should be able to have recourse directly to the Treaty.

Voluntary unemployment. As some form of connection with employment is at the basis of the free movement of persons under the Treaty of Rome, it is not surprising that a wilful refusal to work is a ground for withdrawing the right of residence.[89] However, this is not a general ground of expulsion, as it does not apply, for obvious reasons, to the recipients of services and persons whose right of residence has been continued after the cessation of employment.

Involuntary unemployment. With the exception of recipients of services and persons who have ended their working life, the right of residence, unlike the right of entry, is founded on actual employment.[90] Involuntary unemployment is, therefore, theoretically as much a ground for expulsion as voluntary unemployment. In the case of providers of services and their employees and employees of a host employer under a contract for less than a year, the right of residence is limited to the duration of their employment, and the involuntary termination of this employment will automatically entail the loss of the right to residence.[91] There is no need here for involuntary unemployment as a specific ground of expulsion. With regard to persons with an unlimited right of residence, only self-employed persons who have established themselves in the host state may always be expelled for involuntary unemployment.[92] The position of employed persons under a contract for more than a year depends on how long they have been in the host state. If the involuntary unemployment occurs at any time after the first renewal of their residence permit, that is to say, after five years' residence, it has no effect on their right of residence.[93] However, if it occurs during more than twelve consecutive months immediately preceding this first renewal, the permit may be renewed for only twelve months.[94] The clear implication is that the right of residence is lost if the person is still unemployed at the end of the year's extension.[95] It is not certain what happens where the person obtains employment for only part of the year. If, as seems likely, the provision is intended to enable Member States to rid themselves of non-nationals who prove themselves incapable of holding a steady job, the right of residence will be lost unless employment is obtained and kept.

Objection could be taken to the formulation of this rule, in that the loss of the right of residence flows from the necessity to renew the permit, which gives substantive force to that document. However, if the misleading terminology is overlooked, the basis of the rule is sound. It preserves the need for a real work connection as a basis of the right of residence while removing the obstacle to free movement that would arise if, after a connection of over five years with another Member State, a worker were forced to uproot himself and return home through no fault of his own. This compromise is perfectly consistent with the Treaty where it is the basis for the express provision for a continued right of residence after the cessation of employment.[96]

There is no logical basis for not according the same protection to a self-employed person who has been established in another Member State for over five years. An ever-present threat of possible expulsion on the ground of involuntary unemployment is just as much an obstacle to freedom of establishment as it is to the free movement of labour. The failure of Article 4(1), paragraph 4 of Directive 73/148 to protect the self-employed against this hazard may thus be said to contravene the guarantee of freedom of establishment accorded by Article 52 of the Treaty. In the event of expulsion a self-employed person should be able to rely on the direct effect of this Treaty provision in order to have the measure annulled.[97]

Even where involuntary unemployment is a possible cause for expulsion, it is still counted as employment for the purposes of qualifying for a continued right of residence.[98] This leads to odd results. Thus, where a worker is involuntarily unemployed for over twelve months before his first renewal and receives a year's extension, he will qualify for a continued right of residence if he reaches retirement age or is permanently incapacitated during this year, whether or not he obtains employment. A self-employed person who becomes involuntarily unemployed is, according to Directive 73/148, liable to expulsion, but his vulnerability will end if he qualifies for a continued right of residence before he is actually expelled. This anomaly probably results from an unconscious inconsistency in draughtsmanship, but it is not inconsistent with the Treaty, where the only stated prerequisite for the continuation of the right to reside is the fact of having worked at some time.[99]

People residing in another Member State after having ended their working life and recipients of services are not liable to expulsion for involuntary unemployment.

Incapacity. Temporary incapacity due to illness or to an accident which causes an interruption in employment is not a ground for withdrawal of the right of residence.[100] As it does not sever the work connection, it also has no affect on the residence of those persons whose right of residence is limited to the duration of their employment.[101] Permanent incapacity, on the other hand, does sever the work connection. Consequently, it puts an end to a limited right of residence and constitutes a ground of expulsion for persons with an unlimited right of residence.[102] However, where the permanent incapacity results from work[103] or occurs to a person who has to his credit more than two years' continuous residence in the host state,[104] it will qualify the non-national for a continuation of his unlimited right of residence.[105] This is another example of tempering the narrow scope of the right of residence with equity. This time both employed and self-employed persons benefit, which serves to emphasise the peculiar harshness of the treatment of the latter with regard to unemployment.

Incapacity does not affect the right of residence of recipients of services and of those people with a continued right of residence.

Other grounds. With the exception of the public policy exception,[106] no other grounds justify the expulsion of nationals of another Member State who enjoy a right of residence in the host state. In particular, expulsion is not allowed for any infringement of the formalities governing the exercise of the right.[107] A Member State may impose other penalties for such infringements, but these must not be so severe as to restrict the right of residence.[108]

THE SCOPE OF THE RIGHT

The Necessity for a Work Connection

The narrow economic scope of the Treaty provisions on personal mobility is maintained in the secondary legislation on the right of residence, where the acquisition of the right is predicated upon proof of actual employment,[109] establishment,[110] or the provision or receipt of services.[111] The wish to do these things, which will gain a person the right to enter another Member State,[112] is not sufficient to enable him to remain there except on sufferance. The liberal entrance requirements, which reflect the social objectives of the Treaty,[113] are thus counterbalanced by stricter conditions for residence, which, in turn, delineate the place of these objectives within the overall economic purpose of the Community. To put the matter in more concrete terms, an E.E.C. national has the right under E.E.C. law to go to another Member State in order to seek an improvement in his living and working conditions, but he must return whence he came if this does not prove possible, either because he cannot find work or because he does not have the right to pursue his chosen line of employment.[114] The objective feasibility of the wish that gained the right of entry will ultimately decide whether the entrant will be allowed to remain in the host state.

Although a real work connection is always needed in order to acquire the right of residence, both the Treaty and the secondary legislation preserve the right in some instances where the connection is lost for the sake of eliminating potential obstacles to free movement. Accordingly, a non-national with a close link to another Member State will not normally be required to uproot himself and return home upon retirement,[115] permanent incapacity,[116] or involuntary employment.[117] No such indulgence is shown when the non-national resident severs the work connection himself.[118]

The Definition of a Work Connection

The discussion in Chapter 2A[119] on the definition of a work connection applies almost in its entirety to the right of residence as well. However, if a non-national is denied a right of entry because his intended activity does not fall within the Community definition of a work connection, the problems with respect to residence become academic. A self-employed person, for example, who does not qualify for a right of entry because of the temporary nature of his intended establishment will never be in a position to claim a right of residence. Conversely, a non-national who enjoys a right of entry will normally also be entitled to a right of residence with one, and possibly two, exceptions.

Under Articles 6(3) and 8(1)(a) of Directive 68/360 the right of residence is explicitly tied to employment with an employer of the host state or with a domestic provider,[120] so that it is not possible to use the directive in consort with Article 48(1) of the Treaty to assure a similar right for the employees of a domestic employer. These employees may be able to enter the host state under Article 3(1) of the directive,[121] but they can only remain there on sufferance unless they are allowed to rely directly on Article 48(1) of the Treaty. It is suggested that such reliance should be permitted, as discrimination against employees of domestic employers runs counter to the concept of labour mobility enshrined in Article 48(1) and cannot be justified within a scheme of economic personal mobility.[122]

The second exception is more clear-cut and concerns non-nationals who travel to another Member State to investigate the possibility of establishing themselves or providing services in that state. These persons are almost certainly entitled to a right of entry at Community law,[123] but they do not possess the actual work connection necessary to acquire a right of residence.[124] They reside on sufferance, therefore, until they decide to establish themselves or commence providing services.

The Question of Nationality

Non-E.E.C. nationals. The comments that were made with respect to the right of foreign nationals to enter a Member State[125] apply to their right of residence as well. Consequently this right is only enjoyed by E.E.C. nationals with the possible exception of foreign recipients resident in a Member State of the Community who travel to another Member State to receive services from an E.E.C. national.

There is a similar need as in the case of entry to accomodate the non-E.E.C. employees of self-employed persons who have established themselves or who are providing services in another Member State. It is suggested that they have a right of residence that, like their right of entry, flows directly from the freedom of movement that the Treaty accords their employers. They should be treated in the same way as non-E.E.C. family members, to whom the Member States must grant a residence permit.[126]

It is not clear, however, whether non-E.E.C. nationals who have been granted a right of residence on the basis above should also receive the same right to a continuation of their right of residence and the same protection against expulsion for involuntary unemployment as E.E.C. nationals. The Treaty only refers to their right of entry,[127] while the General Programme on services refers to their right of entry and residence but nothing more.[128] The General Programme on establishment seems to follow the Treaty and is concerned only with their right to take up their positions.[129] It could be argued that the personnel will not move unless they receive these additional rights, but it must be remembered that their rights represent an exception to the European dimension of the Community. It would seem preferable, therefore, to keep their rights to the absolute minimum needed to ensure the effective exercise of the freedom of establishment and freedom to provide services. The Treaty and the general programmes suggest that this minimum is the right to entry and a limited right of residence that expires on the conclusion of their employment in the host state.

Domestic nationals. As with the right of entry, domestic nationals are protected by Community law with respect to residence in their home state only where they have severed their connection with that state. The comments made in Chapter 2A on this point thus apply here as well,[130] as does the judgment of the Court of Justice in Saunders (175/78), where the plaintiff was held to have neither a right of entry nor a right of residence in her home state under Community law.[131]

FOOTNOTES

Chapter 2B

[1] See Royer, 48/75, [1976] 2 C.M.L.R. 619 at 639; Watson and Belmann 118/75, [1976] 2 C.M.L.R., 552 at 570; Sagulo, 8/77 [1977] 2 C.M.L.R. 585 at 593; Pieck, 157/79, [1980] 3 C.M.L.R. 220 at 239.

[2] Article 48(3)(d) is thus not really necessary.

[3] See in particular the 2nd recital of the directive, which declares that "the absence of a right so to remain in such circumstances is an obstacle to the attainment of freedom of establishment." See, too, the discussion in Chapter 1, p 27.

[4] It is also somewhat anomalous that the Council has chosen to implement this right for self-employed persons indirectly by way of a directive instead of by a regulation, which is the method prescribed in Article 48(3)(d) for workers. Although the directive is very detailed and leaves little room for national discretion, it would have been tidier to place both self-employed and employed persons under the direct protection of a Community regulation.

[5] See the discussion in Chapter 1, pp. 24-26 and in particular Royer (48/75).

[6] See Chapter 2A, fn. 3.

[7] Royer, 48/75, [1976] 2 C.M.L.R. 619 at 639. See, too, Pieck, 157/79, [1980] 3 C.M.L.R. 220 at 242-243.

[8] Article 4(a) of Directives 68/360 and 73/148; Article 2(a) of Regulation 1251/70 and Directive 75/34.

[9] Co. Dir. 68/360, art. 4(2) and Co. Dir. 73/148, art. 4(1). It would seem that these provisions apply to Directive 75/34 and Regulation 1251/70 extending the scope of the right of residence.

[10] See Co. Dir. 68/360, art. 6(3).

[11] See Co. Dir. 68/360, art. 7(1) and Co. Dir. 75/34, art. 6(2).

[12] See the discussion of expellable offences, infra, pp. 101-105.

[13] The public policy exception is discussed in Chapter 2D.

[14] Co. Dirs. 73/148, art. 5; 75/34, art. 6(1)(b); 68/360, art. 6(1)(a); Comm. Reg. 1251/70, art. 6(1)(b). With the exception of Directive 73/148, the territorial ambit of the right of residence is expressed in terms of the validity of the permit, whereas it is the right of residence itself that must extend to the whole territory of the Member States. The permit only reflects this scope; it cannot create it.

The Court of Justice held in Rutili (36/75) that the territorial ambit of the right of residence cannot be curtailed even on grounds of public policy. A Member State may deny the right completely on these grounds, or it must accord a full right of residence.

[15] See the discussion in Chapter 2A, pp. 66-67.

[16] See Article 1 of both Directives 68/360 and 73/148, which restricts the application of the legislation to E.E.C. nationals. See, also, the discussion, infra, pp. 109-110.

[17] Co. Dir. 73/148, art. 4(1), para. 1 states this explicitly with regard to self-employed persons. The language of Directive 68/360 is, however, exceptionally oblique. It refers in Article 4(1) to the grant of the right of residence and only implies that it is of unlimited duration by stipulating in Article 6(1)(b) that it entitles the holder of the right to a residence permit that is valid for five years and automatically renewable. The directive also does not state directly who may benefit from the unlimited right of residence, but, as employees who provide services or who have a contract for less than one year are excluded by virtue of Articles 6(3) and 8(1)(a), this leaves only those with a contract for a year or more. This presumably includes persons with a contract of indefinite length.

[18] See the discussion of expellable offences, infra, pp. 101-105.

[19] Article 8(2) of Regulation 1251/70 and Directive 75/34 also provides for the Member States to facilitate the readmission to their territories of employed or self-employed persons who had resided and worked there for a long period prior to leaving and taking up residence in another Member State and who now wish to return upon reaching retirement age or becoming permanently incapacitated. This provision, however, confers no right of residence.

[20] Article 2(1)(a) of Directive 75/34 and Regulation 1251/70.

[21] Where there is no such legislation applicable to self-employed persons, the age of sixty-five is substituted - see Co. Dir. 75/34, art. 2(1)(a), para. 2.

[22] The words "employment" and "unemployment" are used in this chapter to refer to both employed and self-employed persons.

[23] Article 2(1)(b) of Directive 75/34 and Regulation 1251/70.

[24] An additional prerequisite with regard to occupational disease is that it must entitle the non-national to a pension that is payable in part by the host state. This prerequisite will be met whenever the disease is related to the non-national's employment in the host state - see Co. Reg. 1408/71, art. 57.

[25] Article 4(2) of Regulation 1251/70 and Directive 75/34.

[26] It appears, however, that the self-employed person runs the risk of expulsion for involuntary unemployment until he does so qualify - see the discussion, infra, p. 105.

[27] Article 4(1) of Regulation 1251/70 and Directive 75/34. Note that the wording of the legislation permits but does not require a longer absence to disqualify the non-national resident.

[28] Article 4(1) of Regulation 1251/70 and 75/34. No allowance is made for longer absences for other valid reasons - see the discussion, infra, p. 102.

[29] See Article 2(1)(a), (b) of Regulation 1251/70 and Directive 75/34.

[30] See Article 2(1)(a) of Regulation 1251/70 and Directive 75/34.

[31] This would alleviate some of the problems caused by the disparity with the normal residence requirements - see the discussion, infra, pp. 102-103.

[32] Article 2(2) of Regulation 1251/70 and Directive 75/34.

[33] Co. Dirs. 68/360, art. 6(1)(b); 73/148, art. 4(1), para. 2; 75/34, art. 6(1)(c); Comm. Reg. 1251/70, art. 6(1)(c). The permit can, however, be only valid and automatically renewable as long as the right of residence is retained.

[34] Co. Dirs. 68/360, art. 4(3)(a); 73/148, art. 6; See, too, Royer, 48/75, [1976] 2 C.M.L.R. 619 at 643-644; Sagulo, 8/77, [1977] 2 C.M.L.R. 585 at 596; Pieck, 157/79, [1980] 3 C.M.L.R. 220 at 242-243.

[35] Article 5(2) of Regulation 1251/70 and Directive 75/34.

[36] Article 5(1) of Regulation 1251/70 and Directive 75/34.

[37] This includes seasonal workers - see Co. Dir. 68/360, arts. 8(1)(c) and 6(3), para. 2.

[38] All these persons must be E.E.C. nationals - see fn. 20.

[39] This is explicitly stated in Article 4(2), para. 1 of Directive 73/148 with regard to self-employed persons and recipients of services, but, once again, the language of Directive 68/360 is confusing. It is clear that an employee of a domestic provider or host employer needs to be employed in order to acquire a right of residence (Articles 6(3) and 8(1)(a)), but the duration of this right is not expressly related to the length of the employment. The directive is only concerned with how the right of residence is to be evidenced. If the employment is for an expected period of three months or less, the employee obtains a right of residence that is attested by his travel documents and a declaration by his employer that states the expected duration of the employment - see Article 8(1)(a). If the employment is for a longer period, the employee must obtain a temporary residence permit whose validity will be for a limited period that may or may not

coincide with the expected duration of the employment - see Article 6(3). In both cases the length of the right of residence appears to depend on the time limit set out in the evidentiary document. This is unacceptable as it attributes a substantive force to this document, whereas the length of the right must arise independently of the document. It can only do this if it is related to the duration of the employment. It is suggested, therefore, that the position of the employee is the same as that explicitly stated for the self-employed provider or recipient.

[40] Co. Dirs. 73/148, art. 4(2), para. 3; 68/360, art. 8(1)(a).

[41] Co. Dirs. 68/360, art. 8(2); 73/148, art. 4(2), para. 3.

[42] See fn. 39.

[43] Co. Dir. 68/360, art. 6(3) together with art. 4(3)(a),(b).

[44] Co. Dir. 73/148, art. 4(2), para. 2 together with art. 6.

[45] Co. Dir. 68/360, art. 6(3).

[46] See fn. 34.

[47] Co. Dir. 73/148, art. 4(2), para. 2.

[48] Co. Dir. 68/360, art. 6(3).

[49] See Derrick Wyatt and Alan Dashwood, The Substantive Law of the E.E.C. (London: Sweet and Maxwell, 1980), p. 133.

[50] Wyatt and Dashwood, op. cit., p. 134.

[51] Co. Dir. 73/148, art. 4(2), paras. 1 and 2.

[52] Co. Dir. 73/148, art. 4(2), para. 1; 68/360, arts. 6(3) and 8(1)(a).

[53] Wyatt and Dashwood, op. cit., p. 134.

[54] Article 48(3)(c).

[55] Article 2(1)(c) of Regulation 1251/70 and Directive 75/34.

[56] This requirement is why such workers are called "frontier workers." Wyatt and Dashwood, op. cit. at p. 144 criticize the limitation of this benefit to frontier workers, arguing that all workers who reside in a Member State other than that of employment should benefit. On the other hand, a non-national's right of residence must be based on some connection with the host state, and a weekly return is a no more arbitrary connection than any other period of time.

[57] Article 2(1)(c), para. 2 of Regulation 1251/70 and Directive 75/34. Presumably he is equally entitled on the basis of any permanent incapacity resulting from such employment, but Article 2(1)(c) is silent on this point.

[58] He must continue to be employed in the other state in order to come within the purview of Article 2(1)(c). Under some circumstances involuntary unemployment may result in the loss of the right of residence - see the discussion, infra, pp. 103-106.

[59] Co. Dir. 68/360, art. 8(1)(b).

[60] Ibid.

[61] Co. Dir. 68/360, art. 8(2). See the discussion, infra, pp. 100-101.

[62] See the discussion on the definition of establishment in Chapter 2A, pp. 75-77.

[63] See Chapter 2A, pp. 68-69.

[64] Co. Dirs. 68/360, arts. 4 and 6(1)(b); 73/148, art. 4(1), paras. 1 and 2. See, supra, pp. 93-98 for a discussion of the provisions of these directives.

[65] Co. Dir. 68/360, art. 6(3).

[66] Co. Dir. 73/148, art. 4(2), para. 2.

[67] Co. Dirs. 68/360, art. 8(1)(a); 73/148, art. 4(2), para. 3.

[68] Co. Dirs. 68/360, art. 4(3); 73/148, art.6.

[69] Co. Dir. 68/360, art. 6(3).

[70] See Sagulo, 8/77, [1977] 2 C.M.L.R. 585 at 596-597. In this case the Court of Justice suggested that one year in gaol or an enormous fine was an unreasonable punishment for a non-national residing in Germany without a valid passport in contravention of Article 8(1) of Directive 68/360.

[71] See particularly Co. Dirs. 68/360, art. 4(2) and 73/148, art. 4(1), para. 2.

[72] See Sagulo, 8/77, [1977] 2 C.M.L.R. 585 at 593.

[73] See Royer, 48/75, [1976] 2 C.M.L.R. 619 at 643-644; Sagulo, 8/77, [1977] 2 C.M.L.R. 585 at 596; Pieck, 157/79, [1980] 3 C.M.L.R. 220 at 243.

[74] See Sagulo, 8/77, [1977] 2 C.M.L.R. 585 at 593.

[75] See Watson and Belmann, 118/75, [1976] 2 C.M.L.R. 552 at 571.

[76] See Royer, 48/75, [1976] 2 C.M.L.R. 619 at 640.

[77] See Royer, 48/75, [1976] 2 C.M.L.R. 619 at 639-640; Watson and Belmann, 118/75, [1976] 2 C.M.L.R. 552 at 570.

[78] Co. Dirs. 68/360, art. 8(2); 73/148, art. 4(2), para. 3.

[79] *See* *Royer*, 48/75, [1976] 2 C.M.L.R. 619 at 640; *Watson and Belmann*, 118/75, [1976] 2 C.M.L.R. 552 at 572.

[80] *See* *Pieck*, 157/79, [1980] 3 C.M.L.R. 220 at 241-242.

[81] *See* Chapter 2D.

[82] *See* Co. Dir. 68/360, art. 7(1), which states:
"A valid residence permit may not be withdrawn from a worker solely because he is no longer employed...."

[83] In the secondary legislation (*see* fn. 84) reference is made only to the affect of a prolonged absence on the validity of the residence permit. This could be taken to mean that the rights of short-term employees and providers or recipients of services, who either need no permit or receive a right of abode instead, are not affected by absences of over six months. This clearly cannot be, particularly in the case of short-term employees whose stay is limited to three months - *see*, *supra*, pp. 95-96. Once again, therefore, it must be emphasised that it is the right of residence that is at stake, and there is no reason to differentiate between the holders of this right on the basis of the manner in which they are able to prove it.

In fact, the only persons who are not subject to expulsion for prolonged absence from the host state are those who have just qualified for a continuation of their right of residence upon ceasing work. They have two years in which to claim this continuation, during which time they may come and go as they wish - *see* Article 5(1) of Regulation 1251/70 and Directive 75/34.

[84] Co. Dirs. 68/360, art. 6(2); 73/148, art. 4(1), para. 3; 75/34, art. 6(2); Comm. Reg. 1251/70, art. 6(2). In the case of frontier workers their right of residence in either the state of employment or residence may be lost in this way.

[85] This situation is provided for in the legislation on social security - *see* Co. Reg. 1408/71, art. 22(1)(c).

[86] *See*, *supra*, p. 94.

[87] Article 2(1)(a),(b) of Regulation 1251/70 and Directive 75/34.

[88] Article 2(1)(c) of Regulation 1251/70 and Directive 75/34.

[89] Co. Dirs. 68/360, art. 7(1); 73/148, art. 4(1), para. 4. In the case of frontier workers the right of residence in both the state of employment and residence may be lost.

[90] *See* Co. Dirs. 68/360, art. 4(1),(3) and 73/148, arts. 4 and 6, which require proof of employment in order to obtain a residence permit. *See*, too, *infra*, p. 107.

[91] *See* Co. Dir. 73/148, art. 4(2), para. 1 with respect to self-employed providers of services. Employees who go to work in another Member State for a domestic provider or under a contract for less than a year with a host employer and whose employment is expected to last more than three months obtain a temporary residence permit. It has been suggested that during the validity of this permit, they are protected by Article 7(1)

of Directive 68/360, which prohibits the withdrawal of a valid residence permit on the ground of involuntary unemployment - *see* Wyatt and Dashwood, op. cit., p. 134. This cannot be, for the right of residence, which the permit only attests, depends for its existence on the fact of the employment; once the worker becomes unemployed, the right is lost and the permit is rendered meaningless. *See*, too, *supra*, pp. 91-92.

[92] Co. Dir. 73/148, art. 4(1), para. 4. The frontier worker will lose his right of residence in both the state of employment and residence.

[93] Co. Dir. 68/360, art. 7(1).

[94] Co. Dir. 68/360, art. 7(2). Andrew Durand, "European Citizenship," (1979), 4 *European Law Review*, 1 at p. 11 suggests that Article 7(2) means that involuntary unemployment after the first renewal entails the loss of the right of residence. This interpretation conflicts with Article 7(1), which lays down the general rule that involuntary unemployment does not affect the right of residence except to the extent permitted by Article 7(2).

[95] This is also the view of T.C. Hartley, "The Internal Personal Scope of the EEC Immigration Provisions," (1979), 4 *European Law Review*, 191 at 198.

[96] Article 48(3)(d).

[97] Hartley, op. cit., at pp. 200-201 advances this rationale for the more stringent treatment of the self-employed:

"When this [involuntary unemployment] occurs it will usually be through some fault of his own and his chances of re-establishing himself will be less favourable than a worker's chance of finding a new job."

Considering the precarious economic conditions in present-day Europe neither the concept of fault nor the optimistic assessment of the availability of alternative employment are readily acceptable. In any case, it would be quite usual for a formerly self-employed person to look for paid employment upon the collapse of his business.

[98] Article 4(2) of Regulation 1251/70 and Directive 75/34.

[99] Article 48(3)(d).

[100] Co. Dirs. 68/360, art.7(1); 73/148, art. 4(1), para. 4.

[101] In this instance this includes providers of services and their employees and the employees of a host employer under a contract for less than a year.

[102] Co. Dirs. 68/360, art. 7(1); 73/148, art. 4(1), para. 4.

[103] Article 2(1)(b) of Regulation 1251/70 and Directive 75/34.

[104] *Ibid*. The residence requirement does not apply where the spouse is or was a national of the host state - *see*, *supra*, p. 94.

[105] Permanent incapacity will terminate the right of residence of the frontier worker in the state of employment, as the right depends on the fact of employment. However, it will always qualify him for a continued right of residence in the state of residence, as he will necessarily meet the continuous residence requirement - *cf*. Article 2(1)(c) with Article 2(1)(b) of Regulation 1251/70 and Directive 75/34.

[106] *See* Chapter 2D.

[107] *See*, *supra*, p. 100.

[108] *See*, *supra*, p. 100.

[109] Co. Dir. 68/360, arts. 4(3), 6(3), 8(1).

[110] Co. Dir. 73/148, arts. 4(1), para. 1, 6(b).

[111] Co. Dir. 73/148, arts. 4(2), para. 1, 6(b). There is a problem of enforceability here as providers and recipients of services are entitled to rely just on an identity card or passport as evidence of their right to reside in the host state - *see* Article 4(2), para. 3. However, these persons may still be required to prove the fact of the services in order to demonstrate their entitlement to the right of residence itself.

[112] *See* the discussion in Chapter 2A, pp. 71-73.

[113] *See* the discussion in Chapter 1, p. 7.

[114] The public service exception and the exception based on the exercise of official authority are discussed in Chapter 3E.

[115] Article 2(1)(a) of Regulation 1251/70 and Directive 75/34.

[116] Article 2(1)(b) of Regulation 1251/70 and Directive 75/34.

[117] Co. Dir. 68/360, art. 7(1). *See* the discussion, *supra*, pp. 103-106.

[118] Co. Dirs. 68/360, art. 7(1); 73/148, art. 4(1), para. 4.

[119] See pp. 73-81.

[120] This limitation is never expressly applied to employees under a contract for a year or more, but Article 6(3) surely applies by analogy. There is no reason to suppose that the scope of the right of residence is more extensive in the case of a longer contract, as there is no difference in principle between the two situations.

[121] *See* Chapter 2A, pp. 74-75.

[122] *See* Chapter 2A, pp. 73-75 and Chapter 1, pp. 5-6.

[123] *See* Chapter 2A, p. 76.

[124] *See*, *supra*, p. 107.

[125] *See* Chapter 2A, pp. 81-83.

[126] Co. Dirs. 68/360, art. 4(4); 73/148, art. 4(3).

[127] Article 54(3)(f).

[128] Title II.

[129] Title IIIA, para. 4.

[130] *See* Chapter 2A, p. 83.

[131] *See* Chapter 2A, p. 83.

Chapter 2C

THE RECOGNITION OF COMPANIES AND FIRMS

INTRODUCTION

The pursuit by companies and firms[1] of their activities in other Member States is a complex matter involving the coordination of the diverse company law of the Member States, the possible formation of a European company to facilitate interaction at the Community level between national companies, fiscal harmonisation and the liberalisation of capital movements. Clearly there is material enough here for a separate treatise, and most of these elements of E.E.C. company law go beyond the scope of this study on the freedom of movement of persons. Nevertheless, companies are a frequent means by which individuals conduct their business affairs, and it is necessary to consider the basic mobility rights of these entities. The present chapter is concerned with corporate recognition, which is the equivalent of the rights of entry and residence for natural persons. The rights of companies to engage in a particular activity and to equal treatment in the host state are discussed in Chapters 3 and 4 respectively.[2]

THE LEGISLATION

Treaty Provisions

Articles 52, 54(3)(f), 58, 220.

Convention

Convention relating to the Mutual Recognition of Companies and Legal Persons, concluded pursuant to Article 220 but not yet ratified.

Secondary Legislation

None on the recognition of companies and firms.

General Programmes

General Programme for the abolition of restrictions on freedom of establishment, issued pursuant to Article 54(1).

General Programme for the abolition of restrictions on freedom to provide services, issued pursuant to Article 63(1).

Comments

Right to recognition. Article 58 of the Treaty extends to companies the application of Article 52 on freedom of establishment and of Articles 59 and 60 on the freedom to provide services. Except where a company sets up a secondary establishment in the form of a subsidiary incorporated under the law of the host state, it will have to obtain recognition of its corporate existence in that state in order to do business there; otherwise it will not be able to exercise the legal rights that are essential for the purpose. The question now arises whether the right to corporate recognition flows as a directly enforceable right from the Treaty in the same way as do the rights of entry and residence for individuals.[3] Logically it should do, as recognition is the necessary first step for corporate mobility just as entry and residence are for personal mobility.[4] Moreover, both Article 58, which provides for companies to be treated "in the same way as natural persons," and the general programmes, which accord companies the same status as beneficiaries of the Treaty provisions as individuals,[5] suggest that the right is indeed directly enforceable.[6]

No problem arises in the enforcement of this direct right to recognition in the case of Member States that follow the incorporation theory of corporate law, under which a company is regulated by the law of the state of incorporation regardless of the site of its various facilities.[7] The law of these states is quite capable of permitting companies within their jurisdiction to transfer their primary establishment to another Member State and of according recognition to a company that moves its establishment to their territory. There is sometimes a problem, however, with respect to a company that wishes to transfer its central administration to or from a state that applies the real seat theory of corporate law. This theory holds that a company is to be regulated exclusively by the law of the state where its central administration is located, and in some instances it provides for the loss of corporate existence upon the removal of the central administration from the national territory[8] or requires re-incorporation from a company that transfers its central administration to the state in question.[9] In the first situation the national court would have to re-create a corporate existence for the host state to recognize, and in the second situation it would have to require recognition of a company in derogation from national company law. It might even have to do both where the former host state provides for the loss of corporate existence and the new host state requires re-incorporation.[10]

It is difficult to see how a national court could accede to a claim for corporate recognition on the basis of the Treaty under these circumstances any more than it could enforce the right to a social security benefit in one Member State on the strength of contributions paid into the scheme of another Member State. In both cases it would seem to be that, although the right derives ultimately from the Treaty, it is capable of enforcement only by way of implementing legislation.[11] And just as Article 51 provides for such implementation in the field of social security by Council regulations, so Article 220 stipulates that the mutual recognition of companies is to be regulated by a Convention between the Member States. The Convention itself, which has unfortunately not been ratified, is in the nature of a compromise between the law of those Member States espousing the real seat theory and that of those Member States which adopt the more flexible incorporation approach,[12] and this underscores the view that the mutual recognition of companies should be the result of a consensus between the Member States rather than a matter for judicial fiat.

Nevertheless, it could still be argued that the Convention is only relevant where a company wishes to transfer its central administration and faces the problems of loss of corporate existence or of re-incorporation or both. Where it intends to transfer its principal place of business, which could also be regarded in appropriate cases as its primary establishment,[13] or wishes to set up a secondary establishment or provide services in another state, or where the company is regulated in both the old and new host state by corporate law that creates no problems, there is no obstacle as such to permitting reliance directly on the Treaty for corporate recognition. As in this whole area, there is no guidance available from the Court of Justice, but it is suggested that, by providing for the implementation of the right to corporate recognition by the Convention, the Treaty should be taken as including all situations where recognition is necessary. Certainly the Convention does not confine itself to the problem areas alone.

The failure of the Member States to ratify the Convention on Mutual Recognition means that there is no right to corporate recognition at Community law if the Treaty does not have direct effect. However, the national law of the Member States does accord recognition to non-national companies who provide services or set up secondary establishments in their territory. This accounts for the bulk of corporate activity within the Community, for normally a company will wish to expand its activities rather than transfer its existing operations to another Member State. And if a company does want to transfer its primary establishment to another Member

State, it will only encounter problems if this entails moving its central administration; in Germany it will have to re-incorporate, and it will lose its corporate existence if the home state was France, Germany or Luxembourg. The disadvantage of this reliance on national law is that there is no protection against its repeal.[14]

Status of the Convention. The Convention on Mutual Recognition of Companies was concluded pursuant to Article 220 of the Treaty by an Act of the Representatives of the Governments of the Member States within the Council of Ministers.[15] It is not entirely clear whether such an act constitutes secondary legislation or primary law on a par with the Treaty, but, whatever its nature, the general view is that the Convention cannot modify the Treaty.[16] Otherwise it would represent an amendment and, as such, would be invalid as the mechanism set out in Article 220 does not conform to that laid down by Article 236 for amending the Treaty. Nevertheless, the Convention may well be inconsistent with the Treaty, for it imposes more rigorous requirements for recognition than are warranted by Article 58. It is unlikely, however, that this inconsistency will be challenged when the Convention is ratified, for the Court of Justice only has power to rule on the validity of the Convention if it is brought before the Court by a Member State or the Commission,[17] which are the very parties that were responsible for drawing up the Convention. There can be no review of the Convention's legality *per se*, as the Court's jurisdiction does not extend to acts of the Member States,[18] although the Court could attenuate any inconsistencies by way of its power to *interpret* the Convention.[19]

THE SUBSTANCE OF THE RIGHT

At present the right to corporate recognition is governed by the national law of the various Member States, and so there is no uniform substance of the right as defined by Community law. This situation will be remedied when the Convention is ratified.

As stated earlier, the Convention represents a compromise between the different theories of corporate law obtaining in the Member States. The result of this compromise is that corporate recognition by the host state under Article 1 or 2 of the Convention will entitle a company to exercise the capacities that it enjoys under the law where it was formed subject to two restrictions.[20]

The first of these restrictions is an obvious concession to those Member States that espouse the real seat theory. It permits them to apply to a company that has its central administration in their territory "such provisions of its own law as it considers imperative" in addition to or in derogation from the law of the state of incorporation.[21] These provisions cannot, however, affect the actual existence of the company, as this would vitiate the whole purpose of the Convention.[22] Nevertheless, the concession has been criticised as creating a "futile and esoteric" distinction between the recognition of corporate existence _per se_ and conflict-of-laws rules that govern capacity and the specific rights of companies.[23] Certainly it can lead to confusion among company managers and people who deal with the company as to what law governs a particular corporate act, but its application can be easily prevented if the company inserts a clause to this effect in its charter or if it can prove that it has exercised its activity in the state of incorporation for a reasonable time.[24]

The other restriction is less controversial and permits the host state to deny to a foreign company those rights and powers that it does not accord to like companies under its own law.[25] The capacity to have rights and obligations, to enter into contracts or engage in other legal acts, and to sue and be sued, all of which are crucial to the ability to carry on a business, may not, however, be denied under the Convention.[26] Nor may the rights and powers of a company be denied solely because it has no legal personality under the law of its incorporation,[27] which protects the position of the Anglo-Irish partnership in other Member States.[28]

THE SCOPE OF THE RIGHT

The Definition of the Beneficiaries of the Right of Corporate Establishment

The French version of the second paragraph of Article 58 defines the beneficiaries of the right of corporate mobility in the following way:

> Par sociétés on entend les sociétés de droit civil ou commercial, y compris les sociétés cooperatives, et les autres personnes morales relevant du droit public ou privé, à l'exception des sociétés qui ne poursuivent pas de but lucratif.

This wording, which is echoed in all the original versions of the Treaty[29] expressly excludes only those companies that pursue cultural, religious, political and other non-commercial activities that fall outside the scope of the Treaty. However, if the phrase "les autres personnes morales" (other legal persons) is read conjunctively, it has a limiting effect on the term "sociétés" that would exclude all business entities without a legal personality from the definition.

Most scholars have resiled from such a narrow interpretation of Article 58 and prefer to consider the term "legal persons" as requiring only the capacity to have rights and obligations.[30] This broader view is supported by the Convention, which purports to provide for the recognition of those companies that come within the definition in Article 58 of the Treaty.[31] Article 1, which defines the beneficiaries of the right to recognition, omits any reference to "legal persons" in favour of the wider formulation "capacity to have rights and obligations," while Article 8 goes even further and prohibits the denial of recognition solely on the ground that a company does not possess a legal personality in the state where it was formed.

Even if this more liberal interpretation of Article 58 is valid, it is still not certain whether it is broad enough to encompass the United Kingdom or Irish partnership. Under Anglo-Irish law partnerships do not have a separate legal personality from the members of the firm, although they do have the right to sue and be sued in the firm name. This, in Goldman's view, is sufficient to bring them within Article 1 of the Convention and hence within the Treaty definition as well:

> ...it follows...that if a company is given by the law under which it was formed the capacity to bring or defend actions in its own name,...that will suffice for it to be recognized.[32]

But the matter is not free from doubt, for this capacity to sue and be sued is a procedural device that does not alter the legal status of the partnership. It is still the partners who ultimately possess the rights and obligations at issue in any judicial proceeding involving the partnership. Thus, if Article 58 or the Convention require a substantive legal capacity, the Anglo-Irish partnership cannot qualify on the ground advanced by Goldman.[33] There are, however, other rules relating to this type of partnership, such as the concept of partnership property and the fiduciary duties of the partners inter se, that do possibly, in the words of another scholar, "distinguish the commercial association from its members sufficiently to allow it to benefit from the Treaty provisions."[34]

In view of these problems surrounding the legal nature of the Anglo-Irish partnership, it is worth while taking a close look at the English version of Article 58, which, it is suggested, can be interpreted as explicitly including this entity as a beneficiary of the Treaty provisions on corporate mobility. The English wording is as follows:

> "Companies or firms" means companies or firms constituted under civil or commercial law, including cooperatives, and other legal persons governed by public or private law, save for those which are non-profit-making.[35]

The use here of the word "firms" in addition to "companies" adds little if anything to the meaning of the latter and is clearly intended to bring partnerships within the ambit of the definition in Article 58.[36] The phrase, "other legal persons," is thus to be read disjunctively in the English version with no limiting effect on the preceeding terms, which obviates the need to fit the United Kingdom and Irish partnership within it.

The objection that this view of the English version distorts the meaning of the original versions can be met by the observation that it more accurately reflects their spirit. The otherwise wide ambit of Article 58[37] strongly suggests that it was the intention of the drafters of the Treaty to encompass all the business entities that existed at the time under the diverse company laws of the founding Members States, and that the addition of the phrase, "other legal persons," was in the nature of an afterthought to cover those entities that had eluded specific mention.

There still remains a problem with the Convention, whichever way the Anglo-Irish partnership is brought within the purview of Article 58.

For, despite the explicit inclusion of business entities without a separate legal personality in Article 8 and the broad language of Article 1, the Convention nevertheless excludes its application to this partnership by requiring a registered office within the Community as a prerequisite for recognition.[38] This requirement runs counter to Article 58, which premises the right of corporate mobility on the possession of a registered office or the location of the central administration or the principal place of business within the Community, but it only prejudices the Anglo-Irish partnership, which does not have a registered office at all. All other business entities of the Member States have a registered office within the Community as an automatic consequence of having been formed under the law of a Member State. The wording of the Convention would appear to reflect the original composition of the Community, of which the United Kingdom and Eire were not members. The solution would be for the Court of Justice to interpret the requirement as applying only to those entities that have a registered office, or for the British and Irish governments to cause a Joint Declaration to be added to the Convention stating that it applies to partnerships constituted under their law.

The Necessity for a Work Connection

As with natural persons, a company cannot take advantage of the mobility provisions of Community law unless it has the required work connection. In the case of companies this means that they must be profit-making organizations,[39] which does not entail that they make an actual profit but only that they "engage in economic activity that is normally conducted for compensation."[40] According to Article 2 of the Convention it is sufficient if this is a secondary purpose of the company, a concession that can be grafted on to Article 58 without doing violence to its wording.

The Definition of a Work Connection

The form that the economic activity of a company should take in order for it to come within the Treaty provisions and qualify for recognition under the Convention[41] is the same as that for self-employed persons. Thus, only a company that sets up a permanent primary or secondary establishment in another Member State[42] or that provides services across national borders to a recipient who resides in a state other than that where the company is established[43] will be able to rely on the Convention.

In order to set up a secondary establishment or provide services in a Member State, a company must have a pre-existing primary establishment in another Member State.[44] Title I of both general programmes suggests that this entails the presence elsewhere within the Community of a company's central administration or principal place of business. Where only the registered office of the company is situated within the Community, the general programmes permit the requirement of a primary establishment to be met by the company demonstrating "a real and continuous link with the economy of a Member State."[45] This presumably means that it must show that it generates significant revenues or has permanent investments in a Member State,[46] for the general programmes specifically exclude the nationality of the members of the company or of the executive officers as sufficient evidence of the required link.[47] As the Treaty itself contains no definition of "primary establishment," this guidance provided by the general programmes is probably definitive.

An interesting problem arises with respect to a company's right to investigate business opportunities before establishing itself or providing services in another Member State. It was suggested earlier[48] that this right derives from Articles 52 and 59 in the case of self-employed persons, who qualify for a right of entry under Directive 73/148 in order to conduct their exploratory investigations. In the case of companies these missions will normally be carried out by the company's employees, who, as employees of a domestic employer, may or may not have a right of entry under Directive 68/360 or Article 48 of the Treaty.[49]

The Question of Nationality

The definition of an E.E.C. company. Just as only E.E.C. nationals are eligible for rights under the Treaty's personal mobility provisions, so Article 58 limits the right of corporate mobility to companies or firms that are "formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community." This definition of an E.E.C. company has been criticised as too liberal for thus permitting outside interests with a mere formal link with the Community through their registered office in a Member State to take advantage of the Treaty provisions. But, as Goldsmith points out, the criticism is unfounded, for a company wishing to provide services or set up a secondary establishment under the Treaty must already be established within the Community, while the very act of setting up a primary establishment in a Member State brings about a close association with the Community.[50] In this context it is difficult to see the relevance of the requirement contained in Article 1 of the Convention that a company *must* have a registered office in a Member State. An insistence that a company possess this formal link with the Community hardly tightens up the definition of an E.E.C. company, and, in any case, most companies that fall within Article 58 have a registered office in the Community by virtue of having been formed under the law of a Member State. All this provision does, in fact, is to make life difficult for the Anglo-Irish partnership.

The circumvention of national restrictions on foreign business activity. Under the Treaty it is possible for a foreign company that does not meet the requirements of Article 58 to incorporate a subsidiary company under the law of a tolerant Member State in order to set up the primary establishment in another Member State with more stringent controls on foreign companies and their subsidiaries. Article 3 of the Convention permits a Member State to frustrate this device by refusing recognition to companies that have their central administration outside the Community, unless these companies already have a "genuine link with the economy" of another Member State. The effect of this provision is to assimilate the prerequisites for setting up a primary establishment to the more onerous ones for opening up branches and the like. It does not completely bar foreign companies from sneaking through the back door into Member States that do not permit or severely restrict the incorporation of foreign-controlled subsidiaries, but it makes the stratagem more costly and difficult. For example, if an American company wished to gain access to the market in Member State A, where it was prevented from setting up a subsidiary, it could still do so by incorporating the subsidiary in Member State B, but it would not be able to set up either a primary or a secondary establishment in Member State A unless the subsidiary had already become operational in Member State B. If Member State A is the goal, this is a circuitous and expensive way to achieve it. This provision clearly conflicts with Article 58,[51] but it is possible to justify it as an exception based on public policy grounds under Article 56(1) of the Treaty.[52]

The formula only applies to companies that actually have their central administration outside the Community, which, in the case of foreign-controlled subsidiaries without executive offices of their own, means their parent company. It does not affect a bona fide Community enterprise that does not yet have a central administration. Thus, if a group of English businessmen were to incorporate a company in England with the intention of setting up all their facilities in France, including the central administration, they would have no problem with recognition under Article 3 of the Convention.

Non-E.E.C. employees. The right to free movement of key employees of companies who do not possess the nationality of a Member State of the Community flows from the right of corporate establishment. It is mentioned in the General Programme on establishment[53] and in Article 54(3)(f) of the Treaty. There is a corresponding right to use non-E.E.C. personnel for the provision of services, although this is not mentioned in the Treaty. The position of such corporate employees is the same as that of the non-E.E.C. employees of self-employed persons and has been discussed earlier in this study.[54]

FOOTNOTES

Chapter 2C

[1] Henceforward the term "companies" is used for both companies and firms except where these entities are subject to different considerations.

[2] *See* Chapter 3D, pp. 281-282 and Chapter 4E, pp. 444-445.

[3] *See* Chapter 2A, p. 65 and Chapter 2B, p. 91.

[4] *See* Chapter 1, p. 3.

[5] Title 1. *See*, too, the discussion on the reference to corporate rights in the preambles to some of the Council directives on self-employed activities in Chapter 3B, p. 214.

[6] Earlier scholars seem to favour this position - *see* U. Everling, *The Right of Establishment in the Common Market* (Chicago: 1964) and J. Renauld, *Droit Européen des Sociétés* (Brussels: 1969). The better view nowadays is that the right to recognition is not directly enforceable - *see* Michael Goldsmith, "Reciprocal Enforcement of Judgments; Mutual Recognition of Companies, and Measures affecting Companies; the European Company," *Common Market Law*, ed. Alan Campbell (London: Longmans, 1969-1973), III, p. 471 and Derrick Wyatt and Alan Dashwood, *The Substantive Law of the E.E.C.* (London: Sweet and Maxwell, 1980), p. 197. Hans Smit and Peter Herzog, *The Law of the European Economic Community* (New York: Matthew Bender, 1976-1982) at II, p. 2-640 still refer, however, to the controversy surrounding this issue.

[7] *E.g.* Ireland, the Netherlands, and the United Kingdom.

[8] This is the normal rule under French, German and Luxembourg corporate law.

[9] Only Germany among the "real seat theory" states has this requirement.

[10] This would be necessary, for example, if a French company were to transfer its central administration to Germany.

[11] *See* Chapter 1, p. 23-24 for a discussion of the elimination of complex discriminatory practices.

[12] *See*, *infra*, p. 125-126 for a discussion of this compromise.

[13] Smit and Herzog, op. cit. at II, p. 2-646 maintain that only the central administration can be considered the primary establishment, presumably because this is where the major decisions affecting the company are taken. However, it is imprudent to set such a hard and fast rule considering that a company's principal place of business may generate most of its custom and enjoy significant independence from central control. It should also be noted that the German and French texts of the Treaty use the term "principal place of business" (*Hauptniederlassung: principal établissement*) in Article 54(3)(f) where the English text reads "main establishment."

[14] *See* Goldsmith, op. cit., p. 474.

[15] For a discussion of this mechanism, *see* P.S.R.F. Mathijsen, *A Guide to European Community Law* (London: Sweet and Maxwell, 1980), pp. 105-107.

[16] *See* P.J.G. Kapteyn and P. Verloren van Themaat, *Introduction to the Law of the European Communities* (London: Sweet and Maxwell, 1973), p. 120; Goldsmith, op. cit., p. 460; R.H. Lauwaars, *Lawfulness and Legal Force of Community Decisions* (Leiden: A.W. Sijthoff, 1973), p. 244.

[17] Pursuant to Articles 169 and 170 respectively - *see* Kapteyn and Themaat, op. cit., p. 122. The basis for such a ruling would be that the Member States, in concluding a convention that is contrary to the Treaty, failed in their obligations under the Treaty.

[18] Under Article 173 the Court may only review the legality of acts of the Council and the Commission.

[19] Pursuant to Articles 164 and 177. For the purposes of these articles the Convention would be considered an addendum to the Treaty.

[20] Article 6.

[21] Article 4, para. 1.

[22] For the contrary view, *see* K. Lipstein, *The Law of the European Economic Community* (London: Butterworths, 1974), p. 149.

[23] Eric Stein, "Conflict-of-Laws Rules by Treaty: Recognition of Companies in a Regional Market," (1970), 68 *Mich. L.R.* 1327 at 1326. But any confusion has been alleviated to some extent by the coordination of national company law pursuant to directives issued under Article 54(3)(g) of the Treaty - *see* Directive 77/91, 1977 *O.J.* L. 26, p. 1 on the formation of public companies. A comprehensive coordination of company law is, however, far from complete - *see* Smit and Herzog, op. cit., II, pp. 2-560ff.

[24] Article 4, para. 2.

[25] Article 7, para. 1.

[26] Ibid.

[27] Article 8.

[28] But *see* the discussion, *infra*, pp. 128-129 on whether the partnership is even covered by the Convention.

[29] *I.e.* in the German, Dutch and Italian versions. The German text, for example, reads as follows:

> "Als Gesellschaften gelten die Gesellschaften des bürgerlichen Rechts und des Handelsrechts einschließlich der Genossenschaften und die sonstigen juristischen Personen des öffentlichen und privaten Rechts mit Ausnahme derjenigen, die keinen Erwerbszweck verfolgen."

[30] See Smit and Herzog, op. cit., II, p. 2-641; Goldsmith, op. cit., p. 780; Berthold Goldman, "The Convention Between the Member States of the European Economic Community on the Mutual Recognition of Companies and Legal Persons," (1968-1969), 6 C.M.L. Rev. 104 at 113; Wyatt and Dashwood, op. cit., pp. 195-196.

[31] Preamble, 1st. recital.

[32] Goldman, op. cit., p. 113. Wyatt and Dashwood, op. cit. at p. 196 also take this view.

[33] Lipstein, op. cit. at p. 149 maintains that it is a substantive requirement and that the capacity to sue and be sued is not sufficient.

[34] Goldsmith, op. cit., p. 780.

[35] Emphasis added. The English version has the same legal force as the original versions of the Treaty - see Article 100 of the Act of Accession.

[36] Richard Plender and John Usher, Cases and Materials on the Law of the European Communities (London and Basingstoke: Macmillan, 1979) at p. 406 take this view.

[37] Smit and Herzog, op. cit., at II, p. 2-641 remark on this and point in particular to the inclusion of cooperatives.

[38] Article 1.

[39] Article 58, para. 2.

[40] Article 2 of the Convention. This can be taken to be the meaning of Article 58 as well, as a requirement of actual profit would be absurd. It is the nature and not the success of a company's business activities that is the issue.

[41] The Convention only applies to companies that come within the provisions of Article 58 - see Preamble, 1st recital.

[42] See Chapter 2A, pp.

[43] It may be sufficient that the services are provided to another Member State regardless of the location of the recipient - see Chapter 2A, pp. 77-78.

[44] See Chapter 3D, pp. 284-285.

[45] Title I.

[46] Smit and Herzog, op. cit. at II, p. 2-646 suggest this as a criterion.

[47] Title I.

[48] See Chapter 2A, p. 76.

[49] See the discussion of this problem in Chapter 2A, pp.73-75.

[50] Op. cit., pp. 777-778.

[51] This does not necessarily mean that the provision is invalid - see, supra, p. 124.

[52] See Chapter 2D, pp. 155-156.

[53] Title IIIA, para. 4.

[54] See Chapter 2A, pp. 82-83 and Chapter 2B, pp. 109-110.

Chapter 2D

THE EXCEPTION ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY AND PUBLIC HEALTH

THE LEGISLATION

Treaty Provisions

Articles 48(3), 56, 66.

Convention

Convention relating to the Mutual Recognition of Companies and Legal Persons, concluded pursuant to Article 220 but not yet ratified.

Secondary Legislation

Council Directive 64/221/EEC, issued pursuant to Article 56(2).[1]

Council Directive 72/194/EEC, issued pursuant to Articles 49[2] and 56(2).

Council Directive 75/35/EEC, issued pursuant to Articles 56(2) and 235.

General Programmes

General Programme for the abolition of restrictions on freedom of establishment, issued pursuant to Article 54(1).

General Programme for the abolition of restrictions on freedom to provide services, issued pursuant to Article 63(1).

Comments

The Source of Community Law. The Treaty gives the Member States the right to take measures in derogation of freedom of movement on the grounds of public policy, public security and public health[3] and authorizes the Council to coordinate the use of this exception.[4] The resulting secondary legislation, Directive 64/221, as amended by Directives 72/194 and 75/35, aims at a uniform application of the exception by setting down the criteria for its use. The effect is to subordinate the discretion of the Member States under the Treaty to the terms of Directive 64/221 and to enable individuals to oblige the Member States to act accordingly. The Court of Justice has confirmed that this *modus operandi* of the Council is within its authority under Article 56(2) of the Treaty.[5] On several occasions it has also held the provisions of Directive 64/221 to be directly effective.[6]

The ambit of the exception. Within the Treaty itself the ambit of the public policy exception is not uniform. Article 48(3) only permits measures derogatory of the free movement of labour in relation to entry and residence,[7] whereas Article 56(1) provides for a general application of the exception in the field of establishment and services.[8] The general programmes on establishment and services underscore the wider ambit of Article 56(1) by subjecting the envisaged abolition of restrictions on the right of self-employed persons to pursue a livelihood to "provisions on special treatment for foreign nationals on grounds of public policy, public security and public health."[9]

Council Directive 64/221 applies to both workers and self-employed persons[10] although it is based only on Article 56(2).[11] Paradoxically, it limits the application of the exception to entry and residence[12] so that it is co-extensive in scope with Article 48(3) rather than Article 56(2). The question arises whether it is within the Council's competence to limit the scope of the Treaty in this way.

Wyatt and Dashwood harbour no such doubts as to the propriety of the Council's approach and see the matter thus:

> The integrated scheme of Articles 48 to 66, the parallel interpretation given to these provisions in relation to discrimination, entry and residence, and the fact that the public policy provisos of Article 48(3) and Article 56(1) are given "closer articulation" in one and the same Directive...compels [sic] the conclusion that the text of Article 56 is to be interpreted in an identical manner to that of Article 48(3).[13]

To conclude, as Wyatt and Dashwood do, that the formulation of Directive 64/221 is definitive of the interpretation of Article 56(1) is to beg the question entirely; nor does it necessarily follow that, because Articles 48 to 66 form an integrated scheme susceptible of parallel interpretation in other areas, the Council has the right to impose here a uniformity that contravenes the clear language of the Treaty and contradicts its own interpretation of Article 56(1) in the general programmes. Theoretically, therefore, it would seem preferable to hold that Directive 64/221 is not exhaustive of the rights of the Member States with respect to establishment and services and to permit national governments direct recourse to Article 56(1), should they desire to apply the exception to the rights of self-employed persons to employment or equal treatment.

In practical terms, however, this option of direct recourse to the Treaty is probably not available to the Member States. The Court of Justice has indicated in Rutili (36/75) that the public policy exception must be interpreted in accordance with the Community principle of proportionality and the similar provisions of the European Convention on Human Rights, which means that "no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above-quoted Articles [on freedom of movement] other than such as are necessary for the protection of those interests in a democratic society."[14] Thus, if there are not sufficient grounds under Directive 64/221 to prohibit the presence of a non-national in a Member State, it is difficult to see how that state could justify restricting his rights to employment and equal treatment. Certainly it is inconceivable that discrimination unconnected with employment could be justified, and there are other provisions in the Treaty permitting the Member States to restrict the right to pursue a livelihood in cases of government employment,[15] the exercise of official authority[16] and national security considerations.[17] For these reasons the ambit of the directive should prove definitive.

The terminology of Directive 64/221. Finally, mention must be made of the terminology of Directive 64/221, which is based on the false assumption that it is the residence permit that confers the right of residence.[18] This confusion of the substantive right that flows from the Treaty with the document that evidences it leads to two misconceptions that make it necessary to re-interpret the literal wording of the directive in order to correct them.

The first of these misconceptions finds expression in the repeated reference to the refusal to issue or renew the residence permit in addition to expulsion as a measure that the directive is concerned to regulate.[19] This formulation implies that the issue or renewal of a residence permit is a substantive act that affects the rights of E.E.C. nationals, whereas, in fact, these are mere procedural matters that depend for their disposition on the status of the substantive right. As long as the right of residence has not been denied or withdrawn, the host state is obliged to issue or renew the permit and any regulation of the process by Directive 64/221 is entirely unnecessary. The crux is under what circumstances a Member State may tamper with the substantive right itself on grounds of public policy, security or health, and it is here that the Council is authorized by the Treaty to provide criteria for the protection of E.E.C. nationals. Consequently the references to the issue and renewal of the residence permit should be disregarded as misleading in favour of the term "expulsion," which more accurately describes the action of denying or withdrawing the right of residence that it is the business of the directive to regulate.

The second misconception is that, because the drafters of the legislation viewed the permit as the source of the right of residence, the wording of the directive assumes that all foreign nationals must obtain such a document. As a result Articles 4 and 5(1), which deal respectively with the coordination of measures based on public health and procedural safeguards for prospective residents, are couched exclusively in terms of the issue and renewal of the residence permit, while the length of the period of grace that Article 7 accords to non-nationals who have been expelled from the host state differs according to whether they possess a permit or not.[20] Likewise, Article 9, which grants special rights of appeal to those persons who have lost or been denied a right of residence, is limited by its wording to holders of a residence permit or applicants therefore respectively.[21] The effect of this terminology is to exclude from the ambit of these articles all non-nationals whose right to residence does not entitle them to a permit.[22] This represents a restriction that has no place in a directive that, according to the Treaty provisions that authorize it[23] and its own stated terms of reference,[24] is intended to provide comprehensive rules for the use of the exception in relation to the right of residence. The obvious solution is to correct the misconception that is at the basis of the restriction by interpreting all references to the residence permit as meaning the right of residence itself. In this way the longer period of grace of one month would be available for all non-nationals who have lost their right of residence,[25] and Article 9(1) would afford protection wherever the right of residence is lost. The artifical distinction based on the eligibility for a residence permit, which has no basis in the Treaty, would thereby be ignored.

The wording of Articles 4, 5(1) and 9(2) poses additional problems, as there the reference is not just to a permit but to "a first residence permit," which could be taken to imply that only those persons with an unlimited right of residence evidenced by a renewable permit are included.[26] This makes some sense in Article 4(2), which precludes the expulsion of persons for diseases and disabilities arising after the issue of the first permit, for such a provision accords with the general principle that people who intend to remain permanently in another Member State should not be forced to uproot themselves on account of factors beyond their control.[27] On the other hand, there is no justification for limiting the coordination of measures based on the exception of public health in Article 4(1) or the procedural safeguards for prospective residents contained in Articles 5(1) and 9(2) to persons with an unlimited right to residence. Thus, for the sake of consistency, it would seem a better solution to construe all references to "a first residence permit" as meaning the right of residence itself with the result that any non-national resident or would-be resident would benefit from the restraints that Articles 4, 5(1) and 9(2) place on the actions of national governments.

THE SUBSTANCE OF THE EXCEPTION

Introduction

The exception permits a Member State to refuse entry to a national of another Member State or to deny or withdraw his right of residence in its territory where such action is justified by considerations of public policy, public security or public health.[28] Despite the use of the neutral term "measures' in some of the articles of Directive 64/221,[29] the exception can only be exercised in this way. This was made clear by the Court of Justice in Rutili (36/75), where it defined the scope of the exception as coextensive with that of the rights that it may infringe.[30] In that case the French government had limited the exercise of the right of residence on grounds of public policy by barring an Italian national from certain areas of the Republic, but the Court of Justice insisted that the right had to be exercisable to the full or not at all.[31] The Court's view was also based on the principle of proportionality, for, if a non-national is not dangerous enough to be excluded completely from the national territory, there is no justification for limiting his movements therein. The exception is, then, an all-or-nothing proposition, although a Member State could protect public security by imposing additional formalities and controls on undesirable non-nationals, as long as these remain within the limitations imposed on purely national measures.[32]

Whichever of the grounds are used to justify the use of the exception, they must be bona fide and not "invoked to service economic ends."[33] In addition, every case must be decided on its merits rather than in accordance with legislative or administrative norms.[34] The criteria for the use of the exception differ depending on whether it is based on public policy or security or on public health. The first two grounds are treated as one in Directive 64/221[35] and will be referred to henceforth collectively as public policy.

The Public Policy Exception Proper

The refusal of entry or the denial or withdrawal of the right of residence on the grounds of public policy must "be based exclusively on the personal conduct of the individual concerned." By personal conduct is meant a course of behaviour on the part of the non-national that constitutes evidence of a "present threat to the requirements of public policy." This, in fact, raises two issues, namely the nature of the behaviour that causes the threat and that of the requirements of public policy that must be affected.

The nature of the behaviour. The Court of Justice takes the view that the threat to public policy posed by the non-national's conduct must be "genuine and sufficiently serious,"[36] while Article 3(2) of Directive 64/221 rules out criminal convictions in themselves as sufficient grounds for a Member State to invoke the exception. What is actually required is evidence of a delinquent propensity in the non-national. In Bonsignore (67/74) an Italian resident of Germany was convicted of the unlawful possession of a firearm and of causing death by criminal negligence, and he was ordered to be deported by the German court of first instance as a deterrent against the commission of similar offences by other aliens. The validity of the deportation order was contested before the Cologne Administrative Court, which referred the matter to the Court of Justice. Relying on Article 3, paragraphs two and three of Directive 64/221, the Court of Justice ruled that neither the fact of the conviction itself nor the need to deter others justified the order; it was incumbent on the German court to be able to discern from the course of conduct of the non-national evidence of potential recidivism:

> As departures from the rules concerning the free movement of persons constitute exceptions which must be strictly construed, the concept of "personal conduct" expresses the requirement that a deportation order may only be made for breaches of the peace and public security which might be committed by the individual affected.[37]

Two examples of national courts putting this general principle into practice are Secchi (U.K.) and Re Deportation of an Italian Robber (Germany). In both instances the national court was at pains to base its decision on the delinquent propensity of the non-national rather than on the conviction alone. In the German case an Italian was appealing an expulsion order to take effect upon his release from serving a jail term for a series of robberies and assaults. The North-Rhine Westfalian Court of Appeal held that the order was compatible with Community law in view of the repetitious nature of the offences and the threats issued by the appellant against the President of the court that had sentenced him. In Secchi (U.K.) an English metropolitan magistrate recommended deportation of an Italian whom he had just convicted of shoplifting and indecent exposure on the basis that his conduct, impenitent attitude and scant financial resources permitted the court "to anticipate either the commission by the defendant of further offences or other infringements of public policy if he were to remain in the country."[38]

The requirement of a delinquent propensity is not, however, absolute. In its reference to the Court of Justice in Bouchereau (30/77), the English Metropolitan Magistrates' Court requested the Court to consider whether, under appropriate circumstances, the fact of a criminal conviction alone could be sufficient at Community law to justify expulsion of a non-national. The English court presumably had in mind a conviction for such a hideous crime that the need for evidence of potential recidivism was obviated, although, considering the relatively innocuous nature of the offence at bar,[39] the relevance of its query is not entirely clear. In its reply the Court of Justice was clearly reluctant to depart from the Bonsignore principle, but, nevertheless, it did agree that past conduct alone could warrant the use of the exception:

> Although, in general, a finding that such a threat [to public policy] implies the existence in the individual concerned of a propensity to act in the same way in future, it is possible that past conduct alone may constitute such a threat to the requirements of public policy.[40]

It appears from the directive that at least some of the conduct that gives rise to the threat to public policy will have to occur within the territory of the host state, for Article 5(2) prohibits Member States from making enquiries as a matter of course about the police records of non-nationals in other Member States. Such enquiries may only be made when they are considered essential, which means, in practical terms, that an individual will first have to commit some offence that brings his presence to the notice of the appropriate authorities of the host state. This is unfortunate, as it hinders Member States from exercising their right of exclusion and expulsion in order to forestall the commission of crimes in their territory. Where, however, the conduct that gives rise to the use of the exception is not illegal, routine enquiries at the point of entry may enable a Member State to apply the exception immediately. This was the case in van Duyn (41/74), where the non-national provided the necessary information concerning her connection with the Church of Scientology that led to her exclusion from the United Kingdom.[41] A would-be-entrant is unlikely to be so forthcoming with respect to illegal activity.

The van Duyn case (41/74) offers an interesting final perspective on the sort of behaviour that may constitute evidence of a threat to public policy. Miss van Duyn, a Dutch national, was refused entry into the United Kingdom on the basis of her membership in the Church of Scientology, which the British government considered to be a socially harmful organization.[42] The matter came before the Court of Justice, which found that the action of the British authorities was a legitimate use of the public policy provision.

Two points emerge from this decision of the Court. Firstly, it confirms that, despite any implications to the contrary in Article 5(2) of the directive, a host state may, in principle, base its use of the exception exclusively on behaviour that has taken place outside its borders. This is perfectly acceptable and indeed necessary in the case of a refusal of entry. The second point is more controversial and concerns the approval by the Court of the proposition that purely passive behaviour can represent a threat to public policy, for no evidence beyond that of mere membership of the Church was adduced by the United Kingdom authorities to attest the propensity of Miss van Duyn to engage in socially harmful activity. To put it a little stridently, it was a question of guilt by association. Yet the Court's view was that, while past membership of the Church was irrelevant, Miss van Duyn's present membership in the organization indicated an identification with its - unacceptable - aims that warranted the conclusion that she herself would act contrary to the public welfare.[43]

Passive conduct, therefore, can constitute a present threat to the requirements of public policy. This must be considered a negative development in Community law, for it opens the way to the use of the exception to bar all manner of political and social undesirables from the benefits of free movement. It has been suggested that the van Duyn decision (41/74) is modified by the later decisions of the Court of Justice in Bonsignore (67/74), Rutili (36/75) and Bouchereau (30/77), which enunciate the principle of the need for a genuine threat to public policy based on a delinquent propensity.[44] This view would seem to be overly optimistic, for the Court made it clear that Miss van Duyn's passive conduct constituted just such a propensity.[45] The legacy of van Duyn is not so easily shaken off.[46]

The requirements of public policy. The second issue concerns the nature of the requirements of public policy that must be affected by the delinquent propensity of the non-national in order for a Member State to be able to use the exception against him. The Court of Justice has ruled that these requirements must involve "one of the fundamental interests of society."[47] This obviously excludes such matters as parking violations and other minor offences that can never affect the fundamental interests of society, however great the likelihood of repetition. Non-compliance with formalities attendant upon the exercise of Community rights would fall into this category. In Royer (48/75) a French national was expelled from Belgium for failure to comply with that country's entrance and residence formalities, but the Court of Justice held that this conduct did not warrant use of the public policy exception.[48] In the same vein, Article 3(3) of Directive 64/221 prohibits expulsion on the ground that the document with which the non-national entered the host state has expired. Nor can a non-national be penalized for exercising rights that are conferred upon him by Community law, such as the right to engage in trade union activity granted by Article 8(1) of Regulation 1612/68.[49]

It is not, however, necessary for the conduct of the non-national to be unlawful in order for it to affect a fundamental interest of socity. This was decided by the Court of Justice, inter alia, in the van Duyn case (41/74),[50] where the denial of entry was based on an alleged propensity to indulge in activity that was considered socially harmful but was nevertheless tolerated in the host state.[51] The Court justified its decision thus:

> It follows...that where the competent authorities of a Member State have clearly defined their standpoint as regards the activities of a particular organization [in this case, the Church of Scientology] and where, considering it to be socially harmful, they have taken administrative measures to counteract these activities, the Member-State cannot be required, before it can rely on the concept of public policy, to make such activities unlawful, if recourse to such a measure is not thought appropriate in the circumstances.[52]

The Court's reasoning is attractive, for it would indeed be foolish to obtain the limitation of the exception to illegal activity at the price of individual freedom within the Member States. And there is little doubt that a Member State may legitimately consider a particular activity to constitute a threat to society without being constrained to prove its sincerity by making it illegal.[53] But the reasoning sidesteps the real issue, for the problem with the Court's approach in van Duyn (41/74) is that it permitted the United Kingdom to invoke the exception with respect to activities that it alone among the Member States regarded as involving the requirements of public policy. The decision thus represents an abandonment of objectivity in the criterion upon which use of the exception is to rest.[54] For, despite the Court's declared intention of controlling the exercise of national discretion in this area,[55] the effect of van Duyn (41/74) is to allow the exception to be used on purely national as opposed to Community considerations. Indeed the Court recognised and accepted this fact when it stated that the requirements of public policy can vary from state to state.[56] The real issue here, then, is not whether Member States should be obliged to make more activities illegal, but whether their exclusion of non-nationals should be based on national or Community standards. The arguments in favour of van Duyn are that national societies have different values that they wish to protect or that the extent of the threat posed by the same conduct may not be the same in all Member States. The contrary argument must be that the acceptance of national divergences in the use of the public policy exception is at odds with the very concept of Community law, which, as the Court has strenuously asserted in the field of human rights,[57] pre-supposes its uniform application.

There is some indication that the Court of Justice has had second thoughts about this aspect of its decision in van Duyn (41/75).[58] In Rutili (36/75), where the Court was faced with the use of the exception by France with respect to an Italian resident's propensity for political agitation, it seems to have adopted a more guarded approach. Although it based its negative attitude towards the French action on the partial nature of the restrictions imposed,[59] it did not appear disposed towards accepting that the fundamental interests of French society were at stake in the case of legitimate political activity.[60] However, the situation in Rutili was more clear-cut, for it would strike at the democratic traditions of the whole Community to hold that political dissent threatens the fundamental interests of society. Perhaps more significant is the context of the van Duyn decision (41/74), coming as it does before the Court's categorical statement in Bouchereau (30/77) that it is indeed only where these fundamental interests are threatened that a non-national's delinquent propensity can justify the use of the exception.[61] It could well be argued in future that an activity such as Miss van Duyn's that is permitted in all other Member States without restraint cannot be considered to meet this criterion laid down subsequent to van Duyn (41/74).

Some scholars take their criticism of the van Duyn decision (41/74) to the extent of condemning the Court's abandonment of the criterion of illegality per se.[62] They take the view that only the criterion of illegality can establish a truly objective norm of public policy, against which, in principle if not in detail, non-national conduct can be judged throughout the Community. This approach is too narrow, for it would exclude activity that is legal but which is uniformly regarded as so reprehensible as to affect the requirements of public policy. An obvious example is prostitution, which was the ground for the expulsion of a French national from Belgium in Pecastaing (98/79).[63] It is noteworthy that this decision has provoked none of the criticism that surrounds van Duyn (41/74), although it too rejects the criterion of illegality. This discrepancy would seem to indicate that it is not so much the abandonment of illegality as the espousal of national subjectivity that is the real problem with van Duyn (41/74).

Another criticism of van Duyn (41/74) is that the Court's decision effectively prohibited Miss van Duyn on grounds of public policy from engaging in employment and outside activities that were open to British nationals. Therefore, the argument goes, it extends the public policy exception to the rights of employment and equal treatment from which it is excluded by Article 48(3) of the Treaty and Article 2(1) of Directive 64/221.[64] The Court anticipated this objection and stressed that the loss of these rights was ancillary to Miss van Duyn's denial of entry,[65] but this reasoning has been condemned as failing to justify the discrimination to which she was subject.[66]

This criticism is unfounded. It cannot be said that, in taking into consideration a non-national's intended employment and outside activities in order to establish a delinquent propensity that will justify the denial of his right of entry or residence, a Member State is using the exception directly against his right to engage in that employment or those activities. On the contrary, it is merely using his intention to do these things as a basis for refusing entry or residence. In other words, the Member State is not telling the non-national that he may enter and reside but that he may not do such and such; rather it is saying that because he wishes to do such and such, which he is perfectly entitled to do in the host state, he may not enter and reside. Obviously this will prevent the non-national from exercising his rights of employment and equal treatment, but this is always the result of the denial of entry or residence. A known gangster, for example, who wishes to set up a legitimate business in another Member State but who is refused entry because of his delinquent propensity, will likewise be unable to exercise his right to pursue a livelihood in that state.

The charge of discrimination in reality only reiterates from another angle the criticism of the Court's rejection of the criterion of illegality in van Duyn (41/74), as the discrimination to which Miss van Duyn was doubtless subject is the inevitable result of a definition of the requirements of public policy that permits the exception to be used in cases of non-national conduct that is not illegal. For, if a non-national intends to take up employment or engage in activities that, despite their legality and consequent availability to nationals, can validly be regarded as affecting the fundamental interests of society, the host state must be able to use such conduct as evidence of a delinquent propensity and accordingly to invoke the exception against that non-national.[67] The only way to avoid this result is to base the requirements of public policy exclusively on the criterion of illegality, which is too restrictive. What is sauce for the goose is sauce for the gander, so that if van Duyn (41/74) is held to be unacceptable, so must Pecastaing (98/79). The same charge of discrimination has not been levelled against the latter case, but, nonetheless, the Belgian authorities based their deportation order against Mme. Pecastaing on her imputed intention to pursue a livelihood that was open to Belgian nationals, namely prostitution. It is suggested, therefore, that criticism of the van Duyn approach to the requirements of public policy should concentrate on the national subjectivity that it allows rather than on the question of discrimination, which is only the consequence of its - generally accepted - rejection of the criterion of illegality.

The application of the public policy exception to companies. The exception also applies to companies, which, according to Article 58 of the Treaty, are to be treated for the purposes of the provisions on personal mobility in the same way as natural persons. This means that, under the Treaty, it is necessary for a Member State to establish evidence of a company's propensity to act contrary to the fundamental interests of society in order to refuse it recognition.[68] Article 9 of the Convention sees this propensity as being evidenced by the company's purpose, its objective and the activity it actually exercises. This approach accords with the Court's interpretation of Article 3 of Directive 64/221.[69] Thus, any illegality connected with these elements would entitle a Member State to withhold recognition, as would, on the basis of the Court's reasoning in *van Duyn* (41/74) and *Pecastaing* (98/79) any association of the company with activities that the host state considers socially harmful yet not illegal.

Article 9 of the Convention extends the use of the exception to violations of national notions of corporate propriety that cannot be said to affect the requirements of public policy as these have been defined in relation to natural persons.[70] Article 10, on the other hand, prohibits reliance by a Member State on any rules or principles of *ordre public* that contravene the Treaty, which seems to negate the wider scope of Article 9. This unfelicitous juxtaposition of articles makes for considerable obscurity, but it is to be hoped that the Court of Justice will rely on Article 10 to give the exception the same scope that it has under the Treaty. At least one scholar, however, does not see this as a realistic possibility.[71]

Smit and Herzog suggest that the public policy exception could also be used by a Member State to refuse recognition to subsidiaries of non-E.E.C. companies that wish to set up a primary or secondary establishment in its territory or to provide services there.[72] Certainly the preservation of national control over the economy can be regarded as a matter of fundamental social importance to the state concerned, but the problem with this suggestion is that, once a subsidiary is incorporated under the law of a Member State and has a registered office within the Community, it becomes, pursuant to Article 58 of the Treaty and Article 1 of the Convention, an E.E.C. company with entitlement to the rights of corporate mobility, including recognition. There would, of course, be no objection to a Member State refusing recognition in the case of a secondary establishment or the provision of services where the company does not have a genuine link with the economy of a Member State, for it would not then possess the existing establishment required by Article 52 of the Treaty.[73] In addition, the Convention would permit recognition to be refused where there is no such link in the case of primary establishment as well.[74] However, neither the Treaty nor the Convention allow for discrimination against a company that can demonstrate a link with a Member State. On the other hand, recourse could possibly be had to the reasoning of the Court of Justice in van Duyn (41/74) to support the proposition than an E.E.C. subsidiary can be identified with the purpose of its parent of effecting a non-E.E.C. incursion into the economy of a Member State, which would justify its exclusion as a present threat to national control of that economy.

The Public Health Exception

The criteria for the use of the exception on grounds of public health are set out in Article 4(1) of Directive 64/221. Only those diseases and disabilities that are listed in the annexes justify action by a Member State, and, once a non-national has acquired a right of residence, he cannot be expelled on account of ailments that arise thereafter.[75] The diseases are categorized according to whether they pose a danger to public health by reason of their infectious nature[76] or a threat to public policy because of the behaviour that they might induce;[77] disabilities can only fall into the latter category.[78]

It should be noted that a distinction is made between a threat to public policy due to a disease or disability, which justifies action on the ground of public health, and the same threat caused by the behaviour of a non-national, in which case the exception will be based on public policy.

This distinction is significant as expulsion on the grounds of public health may only occur where the disease or disability arose prior to the non-national obtaining a right of residence in the host state.[79] Conduct that threatens public policy, on the other hand, justifies expulsion on the ground of public policy at any time. What is to happen, then, to a non-national who is repeatedly convicted of criminal offences that are directly related to a disease or disability contracted since he became a resident of the host state? Examples of such a situation would be a heroin addict who is convicted of possession of the drug, or a person who exposes himself in public as a result of mental illness. May the authorities of the host state expel the individual on the basis of his conduct, or must they regard it as only a manifestation of the illness and continue to respect his right of residence? The matter has not been settled definitively, but it would seem reasonable to suggest that there is need for some additional element before a conviction in relation to a disease or disability can justify action under the public policy exception.[80] In the case of the heroin addict, this additional element would be present when possession turns to trafficking in the narcotic; in that of the mentally ill person, physical injury to another person should suffice. In other words, once the safety of third persons is affected by conduct caused by the disease or disability, public policy should become the ground for expulsion.

THE PROCEDURAL SAFEGUARDS

Introduction

The use of the exception on grounds of public policy or public health by a Member State is subject to certain procedural safeguards in favour of the non-national. These safeguards do not affect the substance of the exception, but they attempt to insure against its arbitrary use and extension. Unfortunately, many of the articles on procedure in Directive 64/221 are plagued by the misconceptions that were discussed earlier in this chapter,[81] and they have to be re-interpreted so as to extend the protection to all persons whose right of residence is infringed on the grounds of public policy or public health. Here more than anywhere else it is inconceivable that the directive was intended to apply only to those residents who qualify for a residence permit. Even if this were the intention of the Council, it is very unlikely that the Court of Justice, with its concern for a strict interpretation of any exceptions to the free movement of persons,[82] would accept such a limitation.

Time Limits

A person who fulfils the appropriate prerequisites automatically acquires a right of residence in another Member State.[83] If the host state wishes to deny this right at its very inception, it must do so as soon as possible and at the latest within six months,[84] for, otherwise, the non-national is held to have definitively acquired the right. It can, of course, still be taken away from him, but different considerations attach to the withdrawal of a right of residence, which the host state may prefer to avoid.[85]

Similar time limits do not exist for the denial of entry or the withdrawal of a right to residence.[86] In the case of entry, the right will have to be refused immediately upon the arrival of the non-national in the host state, for once admission has been gained, the matter is closed. The expulsion of persons with a right of residence, on the other hand, can take place at any time and no constraints need be placed on the length of the national administrative process.

Reasons

Unless the interests of a Member State's security dictate otherwise, a person who has been refused entry or who has lost or been denied a right of residence must be informed of the reasons for this decision.[87] The reasons must indicate the ground upon which the decision is based,[88] and they must contain enough additional information to enable the non-national to prepare a defence.[89]

Appeal Rights

A person whose right of entry or residence has been infringed by the use of the public policy or public health exception has the same legal remedies against this action as "are available to nationals of the State concerned in respect of acts of the administration."[90] Under certain circumstances a person whose right of residence has been denied or withdrawn,[91] but not a would-be entrant, has access to an alternative review procedure based on Article 9 of Directive 64/221.

The nature of this alternative procedure differs according to whether the right of residence is being withdrawn or denied. Except in cases of urgency,[92] a decision to withdraw a right of residence must always be referred by the national authorities to an independent body "before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for."[93] Where a right of residence is denied, as opposed to being withdrawn,[94] there is a genuine appeal procedure, as the matter is referred to the same independent reviewing authority only upon the request of the foreign national affected.[95] This request cannot be refused on grounds of urgency, but the right of defence before the appellate body can be withheld in the interests of national security.[96] It should also be noted that a person who appeals against the denial of his right to residence is only entitled under Directive 64/221 to present his defence in person,[97] whereas a person whose right of residence has been withdrawn enjoys access to legal representation as well.[98] Presumably a decision to deny or withdraw a right of residence cannot stand unless the reviewing body emits a favourable opinion on the measure. This is not explicitly stated in Article 9 of Directive 64/221, but the Court of Justice assumes that it is so.[99]

A distinction is also made in the availability of the review procedure granted by the directive. Article 9(1) requires the automatic review of a decision to withdraw a right of residence only where the national administrative remedies do not include a right of appeal to a court of law, or where this appeal can only be taken on a point of law or has no suspensory effect on the decision to withdraw the right. No such limitations appear to attach to the right of appeal contained in Article 9(2), which is thus always available. This distinction is quite illogical. Not only is there no justification for treating people who have barely arrived in the host state more generously than long-time residents, but it is also rather pointless to provide an alternative procedure where the national remedies do not suffer from the shortcomings mentioned in Article 9(1). It would seem preferable, therefore, to construe the reference in Article 9(2) to "the authority whose prior opinion is required under paragraph 1" as importing into 9(2) the conditions under which this opinion must be sought in Article 9(1). The two paragraphs of Article 9 would then operate in the same way vis-à-vis national remedies.[100]

It must be emphasised that the procedures contained in Article 9 of Directive 64/221 are an alternative to national administrative remedies;

they cannot supplant recourse to the regular courts. Thus, in Pecastaing (98/79), where a non-national was discouraged from challenging a deportation order in the regular courts in favour of an appeal to the Belgian Consultative Committee for Aliens, which had been set up pursuant to Article 9 of the directive, the Court of Justice insisted that she be given access to the regular tribunal empowered to hear cases such as her's.

Period of Grace

A decision by a Member State to refuse a non-national entry into its territory is immediately effective,[101] but where a right of residence is being denied or withdrawn, Article 7 of Directive 64/221 accords the non-national concerned a period of grace of fifteen days or one month respectively in which to leave the host state.[102] All these provisions are subject to delays caused by appeal proceedings.

The length of these delays will vary. Where the national remedies include a suspension of the decision against which an appeal is being taken or where the review procedure provided for by Article 9 of the directive is being used, the non-national is permitted to stay in the host state until the final disposition of his case.[103] A resident will thus retain his right of residence during this period, while an entrant will have to be admitted as a resident on sufferance. In both instances, however, the decision to invoke the exception may be put into immediate effect in cases of urgency.[104]

The delay is much shorter when a non-national has to rely on national remedies that do not have a suspensory effect. At first this was not entirely clear, as the Court of Justice was somewhat equivocal in its pronouncements in Royer (48/75). At one place in its judgment the Court suggested that a non-national must always be able to remain in the host state until he has exhausted all his remedies,[105] but in its reasons for judgment the Court indicated that it suffices if a non-national can remain long enough to make effective use of the national remedies available to him.[106] This equivocation was cleared up in Pecastaing (98/79) in favour of the second of these two propositions:

> If that provision [Article 8] requires that the persons concerned should be able to appeal against the measures affecting him, it must be inferred, as the Court stated in its judgment in Royer ...that the decision ordering expulsion may not be executed - save in cases of urgency - before the party concerned is able to complete the formalities necessary to avail himself of the remedy. However, it cannot be inferred from that provision that the person concerned is entitled to remain in the territory of the State concerned throughout the proceedings initiated by him. Such an interpretation, which would enable the person concerned unilaterally, by lodging an application, to suspend the measure affecting him, is incompatible with the objective of the Directive....[107]

Both Pecastaing (98/79) and Royer (48/75) deal with the rather unusual situation of residents who were relying on national remedies with no suspensory effect, but the principle that these cases lay down is likely to apply more frequently to entrants, who are excluded from the application of Article 9 of the directive and hence dependent solely on national remedies. Once again the delay will mean the retention of the right of residence in the resident and the admission of the entrant on sufferance, except in cases of urgency[108] when the decision can be put into immediate effect for both entrants and residents.

These general principles have the following concrete results. A non-national resident whose right of residence is being denied or withdrawn will almost invariably be able to remain in the host state until the matter of his expulsion has received its final disposition. This is because the decision to expel him will be suspended by Article 9 of the directive even if the national remedies available to him do not have this effect. The only exceptions are in cases of urgency[109] and where the non-national resident chooses to rely exclusively on national remedies without a suspensory effect[110] or is forced to do so by reason of having already exhausted his rights under Article 9.[111] The periods of grace set down in Article 7 of the directive will thus take effect after notification of the final negative disposition of the case, or they will be prolonged in order to enable the non-national resident to set in motion the national appeal procedures.[112] In cases of urgency they will be abrogated altogether. The situation of the non-national entrant who has been denied entry is less fortunate. He will be able to stay in the territory of the host state on sufferance until the final disposition of his case only where the national remedies have suspensory effect. More frequently he will be allowed to stay just as long as is necessary to make effective use of non-suspensory national remedies. In cases of urgency he will have to return immediately whence he came.

THE SCOPE OF THE EXCEPTION

Beneficiaries of the Community Rules

It is clear from the Treaty provisions that the exception on grounds of public policy and health applies to all persons who enjoy a right to entry or residence under Community law.[113] Accordingly, Directive 64/221, which governs the use of the exception by the Member States, is stated in Article 1(1) to be applicable to "any national who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person, or as a recipient of services." Persons who remain in another Member State after having worked there are added as beneficiaries of Directive 64/221 by Directives 72/194 and 75/35 with regard to employees and self-employed persons respectively.[114]

Terminology within Directive 64/221 that appears to derogate from this comprehensive applicability should be re-interpreted. The only persons who should be left outside the protective guidelines of the directive are those who do not possess a right of entry or residence based on Community law, for, where entry or residence is accorded as a privilege by the national law of a Member State, that state may deny or withdraw the privilege more or less as it sees fit.[115] Tourists fall into this category with respect to both rights,[116] and persons who enter another state as of right to find employment or in pursuit of a wish to do business there do so with respect to their residence in the host state.[117] All other persons covered by the personal mobility provisions of the Treaty are included in Article 1(1) of the directive without distinction as to the nature and length of their intended residence.

Although Article 1(1) of Directive 64/221 only refers to natural persons and the other provisions of the directive are couched in terms of entry and residence, it should be recalled that, pursuant to Article 58 of the Treaty, the public policy exception[118] also applies to companies. Thus, the use of this exception to refuse recognition to a company must also accord with the terms of Directive 64/221, unless the Convention is interpreted as extending the ambit of the exception beyond Article 3 of the directive to include national principles of *ordre public*.[119] But even here the procedural safeguards of the directive would apply to companies.

The Question of Nationality

Non-E.E.C. nationals. The Community provisions on personal mobility, including the public policy and public health exceptions, only apply to

E.E.C. nationals, so that it is not surprising that Directive 64/221 restricts its application to "any national of a Member State."[120] However, certain non-E.E.C. nationals, who themselves are not entitled to any rights under the Treaty of Rome, may nevertheless acquire a right of entry and residence on the basis of their E.E.C. employer's right to establishment or the provision of services in another Member State.[121] The question arises whether they come under Directive 64/221 despite their exclusion by Article 1(1) from its terms of reference. There are various reasons for holding that the directive does apply to them. In the first place, as these non-E.E.C. nationals acquire their rights through the operation of Community law, logic dictates that they may be taken away only accordance with the same law, that is to say, pursuant to the criteria set down in Directive 64/221. Secondly, it would surely represent an obstacle to their employers' rights under the Treaty, if such workers could be denied entry or expelled at the total discretion of the Member State concerned. Finally, it is likely that the Court of Justice would hold that any use of the exception is subject to Directive 64/221 by virtue of its insistence on the need to control exceptions to the Treaty strictly.[122] The same arguments apply to the derivative rights of entry and residence enjoyed under Article 1(2) by non-E.E.C. family members.

Domestic nationals. The same considerations apply to the use of the exception against domestic nationals as apply to their rights of entry and residence.[123] Accordingly, a Member State may act to control their movement on grounds of public policy or public health in whichever way it sees fit, unless the domestic national concerned has severed his link with his home state and become assimilated to the position of nationals of other Member States. This was not the case in Saunders (175/78), so that an

English court was able to prohibit a British national from entering or residing in England or Wales for three years without having to justify the measure under the terms of Directive 64/221.

FOOTNOTES

Chapter 2D

[1] This directive deals with the coordination of measures in relation to employed persons as well as self-employed persons, but it is not based on any article of the Treaty that might justify the inclusion of the former. It is suggested that, as the directive aims at limiting the discretion of the Member States and thus contributes towards the implementation of the guarantee of free movement of labour, it could and should have been based on Article 49 in addition to Article 56(2) - *see* Hans Smit and Peter Herzog, *The Law of the European Economic Community* (New York: Matthew Bender, 1976-1982), I, p. 2-475. Failing this, the Council should have acted pursuant to its residual power under Article 235. As it stands, the directive is procedurally defective and could have been challenged under Article 173.

[2] This directive is based on Article 49 in addition to Article 56 (1), which supports the above comments.

[3] Articles 48(3) and 56(1). Article 66 incorporates the exception into the chapter on services.

[4] Article 56(2). Presumably the Council enjoys the same coordinating authority under Article 49.

[5] *See van Duyn*, 41/74, [1975] 1 C.M.L.R. 1 at 15-18; *Rutili*, 36/75, [1976] 1 C.M.L.R. 140 at 155-157; *Bonsignore*, 67/74, [1975] 1 C.M.L.R. 472 at 488.

[6] *See van Duyn*, 41/74, [1975] 1 C.M.L.R. 1 at 19 (although it should be noted that the directive did not help the non-national in this case); *Bonsignore*, 67/74, [1975] 1 C.M.L.R. 472 at 489; *Royer*, 48/75, [1976] 2 C.M.L.R. 619 at 641; *Pecastaing*, 98/79, [1980] 3 C.M.L.R. 685 at 705-707; *Santillo*, 131/79, [1980] 2 C.M.L.R. 308 at 330. *See*, too, the comments on the direct effect of directives in Chapter 1, pp. 16-18.

[7] Some scholars do not share this view because of Article 48(3)(a), which also permits derogatory measures with respect to the right to accept offers of employment in another Member State - *see* John Bowyer, "Social Policy," *European Law and the Individual*, ed. F.G. Jacobs (Amsterdam/New York/Oxford: North-Holland Publishing Company, 1978), pp. 541-542, and also the observations of Advocate-General Gand in *Ugliola*, 15/69, [1970] C.M.L.R. 194 at 200. However, Article 48(3)(a) guarantees only the principle of freedom of choice in the location of one's employment, whereas the right to pursue a livelihood is accorded by Article 48(2), to which the exception does not apply - *see Ugliola*, 15/69, [1970] C.M.L.R. 194 at 201. Obviously the refusal to permit a non-national to enter and reside in the host state will deprive him of this freedom of choice and frustrate his right to employment, but this is not the same as permitting the public policy exception to affect the right directly regardless of whether entry and residence are granted or not. The Court of Justice makes this very distinction between the direct application of the exception to

the right to earn a livelihood, which is not allowed at Community law, and the frustration of this right as a result of a valid denial of entry or residence on public policy grounds in van Duyn, 41/74, [1975] 1 C.M.L.R. 1 at 18.

[8] Article 56 (1) reads as follows:
"The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."

[9] Title III, para. 1.

[10] Article 1(1) refers to "any national of a Member State."

[11] See fn. 1 and the discussion in Chapter 1, pp. 27-28.

[12] Article 2(1).

[13] Derrick Wyatt and Alan Dashwood, The Substantive Law of the EEC (London: Sweet and Maxwell, 1980), p. 192 (footnote omitted).

[14] [1976] 1 C.M.L.R. 140 at 155.

[15] Article 48(4).

[16] Article 55.

[17] Article 223 (1)(b).

[18] See, too, the discussion of this mistaken assumption in Chapter 2B, pp. 91-92.

[19] See Articles 2(1), 7, 8, and 9 of the directive.

[20] The last sentence of Article 7 reads:
"Save in cases of urgency, this period shall not be less than fifteen days if the person concerned has not yet been granted a residence permit and not less than one month in all other cases."

[21] Article 9(1) applies to "a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit," while Article 9(2) refers to "[a]ny decisions refusing the issue of a first residence permit or ordering expulsion of the person concerned before the issue of the permit...."

[22] That is to say, the providers and recipients of services and employees who remain in the host state for three months or less. It is not clear whether Article 9 similarly excludes the right of abode that providers and recipients of services receive if their stay exceeds three months. See, also, the discussion in Chapter 2B, pp. 95-96.

[23] Articles 48(3) and 56.

[24] Article 1(1) of Directive 64/221 states that the directive is to apply to "any national of a Member State who resides in or travels to another Member State...." This clearly includes those persons who will not qualify for a residence permit.

[25] Article 7.

[26] See Chapter 2B, p. 95.

[27] See the discussion of expellable offences in Chapter 2B, particularly involuntary unemployment at pp. 103-106.

[28] Co. Dir. 64/221, art. 2(1).

[29] Articles 2(1), 3(1).

[30] See [1976] 1 C.M.L.R. 140 at 157:
"The reservation contained in Article 48(3) concerning the protection of public policy has the same scope as the rights, the exercise of which may, under that paragraph, be subject to limitation."

[31] [1976] 1 C.M.L.R. 140 at 159. If, on the other hand, partial restrictions on residence are also applicable to nationals, they could, in the Court's view, be validly extended to non-nationals. This is presumably because they would then fall under the rubric of general laws that are non-discriminatory, affecting, as they do, nationals and non-nationals alike. They could not, however, be justified even in these circumstances under the public policy exception in view of the Court's interpretation of its ambit.

[32] See Chapter 2B, pp. 100-101.

[33] Co. Dir. 64/221, art. 2(2).

[34] See Rutili, 36/75, [1976] 1 C.M.L.R. 140 at 155.

[35] Article 3(1).

[36] Rutili, 36/75, [1976] 1 C.M.L.R. 140 at 155.

[37] [1975] 1 C.M.L.R. 472 at 488. See, too, Bouchereau, 30/77, [1977] 2 C.M.L.R. 800 at 823.

[38] [1976] 1 C.M.L.R. 383 at 394. This was, in fact, an alternative basis for the decision to expel, as the magistrate found primarily that the deportee lacked the necessary work connection to come within the Treaty provisions - see Chapter 2A, p. 75.

[39] It concerned the possession of a small quantity of illicit drugs.

[40] [1977] 2 C.M.L.R. 800 at 823.

[41] See the discussion of this case, infra.

[42] At [1974] 1 C.M.L.R. 364 the British government is quoted as taking the following views.

"Scientology is a pseudo-philosophical cult....The Government are satisfied, having reviewed all the available evidence, that scientology is socially harmful....There is no power under existing law to prohibit the practice of scientology, but the Government have concluded that is is so objectionable that it would be right to take all steps within their power to curb its growth."

For the effect of the change in the British government's position, see fn. 46.

[43] [1975] 1 C.M.L.R. 1 at 17.

[44] See Smit and Herzog, op. cit., II, p. 2-622.

[45] [1975] 1 C.M.L.R. 1 at 17.

[46] Nor can any solace be taken from the change in attitude of the British authorities towards the entry of non-national scientologists into the United Kingdom. The Court of Justice was concerned with the general principle of passive conduct in van Duyn (41/74) rather than with its specific manifestation in that case. If a Member State were to take the same attitude towards some other activity that the British government adopted towards scientology, it could still rely on the van Duyn principle.

[47] Bouchereau, 30/77, [1977] 2 C.M.L.R. 800 at 825.

[48] [1976] 2 C.M.L.R. 619 at 644.

[49] Rutili, 36/75, [1976] 1 C.M.L.R. 140 at 155.

[50] See also Pecastaing (98/79), where the Court upheld the use of the exception in the case of prostitution although the activity was not illegal in the host state.

[51] See fn. 42.

[52] [1975] 1 C.M.L.R. 1 at 17.

[53] F. Wooldridge, "Free Movement of EEC Nationals: The Limitation Based on Public Policy and Public Security," (1977), 2 European Law Review, 190 at 195-196 expresses the opinion that conduct that is not illegal cannot threaten public policy. This would seem to be extraordinarily naive - see the criticism of the illegality criterion, infra, p. 152. and Smit and Herzog, op. cit., II, p. 2-617.

[54] This is the objection of many scholars to the decision - see Smit and Herzog, op. cit., II, p. 2-617 and Wyatt and Dashwood, op. cit., p. 151.

[55] Van Duyn, 41/74, [1975] 1 C.M.L.R. 1 at 17.

[56] Ibid.

[57] See the discussion of the Court's attitude to human rights in Chapter 1, pp. 39-41. Van Duyn (41/74) thus stands in marked contrast to such cases as Internationale Handelsgesellschaft (11/70), Nold (4/73) and, in particular, Hauer (44/79), where, at [1980] 3 C.M.L.R. 64, the Court speaks of the need for substantive unity in Community law in order to protect the unity of the Common Market.

[58] This is the opinion of Smit and Herzog, op. cit., II, p. 2-617 and Wyatt and Dashwood, op. cit., pp. 151-152.

[59] See, supra, p. 144.

[60] It repeated the statement made in van Duyn (41/74) that national requirements can vary from state to state but carefully refrained from indicating that this was a proper case for the exercise of national discretion - [1976] 1 C.M.L.R. 140 at 155.

[61] [1977] 2 C.M.L.R. 800 at 825.

[62] P. Leleux, "Recent Decisions of the Court of Justice in the Field of Free Movement of Persons and Free Supply of Services," European Law and the Individual, ed. F.G. Jacobs (Amsterdam/New York/Oxford: North-Holland Publishing Company, 1976), p. 91; Wooldridge, op. cit., pp. 195-196. For the contrary view adopted in this study, see Smit and Herzog, op. cit., II, p. 617.

[63] See also the rather amusing case of Re a Belgian Prostitute (Netherlands), where the prostitute concerned argued before the Queen of the Netherlands in Council that the view that prostitution contravenes the requirements of public policy "does not fit in with the attitudes of 1974" - [1976] 2 C.M.L.R. 527 at 530. Her Majesty was unconvinced!

[64] See, supra, pp. 139-141 , Miss van Duyn was an employee so that there was no question of direct recourse to the Treaty by the British authorities.

[65] [1975] 1 C.M.L.R. 1 at 18.

[66] See Leleux, op. cit., p. 90; Wooldridge, op. cit., pp. 195-196.

[67] Derrick Wyatt's view in "Annotation on Case 30/77 (R. v. Bouchereau)," (1978), 15 C.M.L. Rev. 221 at 226-227 that a Member State can only do this when the otherwise legal conduct of the non-national is responsible for creating the threat would deprive Member States of the use of the exception to prevent the exacerbation of an existing threat. There is no support in the Treaty, the secondary legislation or the jurisprudence of the Court for such a limitation, which in any case would be extremely difficult to enforce.

[68] The exception only applies to the right to recognition, which is the corporate equivalent of the rights of entry and residence for natural persons; it does not apply to the company's right to do business as such.

[69] See the discussion, supra, pp. 145-146.

[70] The first paragraph of the article permits the use of the exception where a company violates "principles or rules which that State considers to be a matter of public order within the meaning of international private law." Paragraph two, however, prohibits the use of the exception solely on the ground that a company only has a single shareholder.

[71] K. Lipstein, The Law of the European Economic Community (London: Butterworths, 1974), p. 151.

[72] Op. cit., II, p. 2-645.

[73] See Chapter 2C, p. 130.

[74] See Chapter 2C, pp. 132-133.

[75] Co. Dir. 64/221, art. 4(2). The provision refers to diseases and disabilities occuring "after a first residence permit has been issued," but this wording should be interpreted as referring to the acquisition of the right of residence - see the discussion, supra, p. 143.

[76] Co. Dir. 64/221, Annex A - e.g. tuberculosis.

[77] Co. Dir. 64/221, Annex B - e.g. drug addiction.

[78] Co. Dir. 64/221, Annex B - e.g. mental illness.

[79] Co. Dir. 64/221, art. 4(2) - see fn. 24.

[80] But see the submission of Advocate-General Warner in Bouchereau, 30/77, [1977] 2 C.M.L.R. 800 at 819:

"Article 4 does not forbid the deportation of a drug addict on grounds other than his drug addiction, unless of course such grounds consist of some other disease or disability."

This view is at odds with Article 4(2) of Directive 64/221, as drug addiction is listed in Annex B as a disability that may not be used as a ground for expulsion. Even if the Advocate-General meant that a disease or disability becomes a matter of public policy once it entails the commission of a criminal offence, he is going too far, as many diseases or disabilities almost inevitably lead to the commission of such an offence. Drug addiction is a prime example; it necessitates the possession of illicit drugs to satisfy the addiction, which, in turn, can lead to a criminal conviction.

The issue of drug addiction was not taken up by the Court of Justice in Bouchereau (30/77), but one hopes that its failure to contradict the Advocate-General will not be taken as confirmation of his view.

[81] See, supra, pp. 141-143.

[82] See Bonsignore, 67/74, [1975] 1 C.M.L.R. 472 at 488; Rutili, 36/75, [1976] 1 C.M.L.R. 140 at 155.

[83] See Chapter 2B, p. 92 and p. 95.

[84] Co. Dir. 64/221, art. 5(1), para. 1. This provision, like Article 4(1), only refers to the refusal to issue a first residence permit, but this should be construed as applying to the recognition of any right of residence - see the discussion, supra, p. 143 and fn. 75.

The second paragraph of Article 5(1) gives the non-national the right to stay in the host state until a decision is made on the recognition of his right of residence. This is an unnecessary provision, as a non-national automatically acquires a right of residence upon fulfilling the appropriate prerequisites, and he will retain this right unless the host state refuses to recognize it or withdraws it.

[85] See the discussion, infra, pp. 159-160.

[86] This is implied by Article 5(1) of Directive 64/221, which sets time limits only with respect to the denial of a right of residence.

[87] Co. Dir. 64/221, art. 6.

[88] Ibid.

[89] See Rutili, 36/75, [1976] 1 C.M.L.R. 140 at 156.

[90] Co. Dir. 64/221, art. 8.

[91] Article 9 refers to the refusal to issue or renew a residence permit and to the expulsion of persons who possess or who have applied for a permit. This wording should be re-interpreted so as to include all persons whose right of residence has been denied or withdrawn - see the discussion, supra, pp. 141-143 and fnn. 75 and 84. However, the article is clearly meant to exclude persons who have been denied entry.

[92] It is up to the national authorities to decide what constitutes an urgency - see Pecastaing, 98/79, [1980] 3 C.M.L.R. 685 at 707. This view is open to criticism, as the term is surely a Community concept that should ultimately be defined by the Court of Justice.

[93] Co. Dir. 64/221, art. 9(1). The review procedure that is followed in the United Kingdom has been the subject of much comment. It involves the making of a recommendation to deport by a judge that may subsequently be acted upon by a Minister of the Crown, which means, as Smit and Herzog point out in op. cit., Cumulative Supplement, 1981, at p. 2-475, that the review precedes the deportation order. The procedure has nevertheless been accepted by the Court of Justice as complying with Article 9 in Santillo, 131/79, [1980] 2 C.M.L.R. 308 at 330, provided that the recommendation is sufficiently proximate in time to the subsequent order. In Santillo (131/79) the lapse of time was over four years, but, despite the misgivings expressed by the Court of Justice at [1980] 3 C.M.L.R. 330-331, the English Court of Queen's Bench declared the recommendation to be quite acceptable - see [1980] 3 C.M.L.R. 212 at 216.

[94] Note that, if the time limits laid down in Article 5(1) of the directive for denying the right of residence are not met, the right can only be withdrawn.

[95] Co. Dir. 64/221, art. 9(2).

[96] Ibid.

[97] Ibid.

[98] Co. Dir. 64/221, art. 9(1).

[99] See Rutili, 36/75, [1976] 1 C.M.L.R. 140 at 156; Royer, 48/75, [1976] 2 C.M.L.R. 619 at 641; Pecastaing, 98/79, [1980] 3 C.M.L.R. 685 at 707-708; Santillo, 131/79, [1980] 2 C.M.L.R. 308 at 330-331.

[100] See Lipstein, op. cit., at p. 134 in support of this view.

[101] Entrants are not mentioned in Article 7 of the directive, which deals with periods of grace.

[102] Except in cases of urgency - see Co. Dir. 64/221, art. 7 and fn. 92.

[103] Under Article 9 of the directive the decision to expel is not valid until it has been reviewed.

[104] Co. Dir. 64/221, art. 9, para. 1 alone mentions the exception of urgency, but the Court of Justice assumes that it applies to all the remedies mentioned in Articles 8 and 9 of the directive - see Royer, 48/75, [1976] 2 C.M.L.R. 619 at 644; Pecastaing, 98/79, [1980] 3 C.M.L.R. 685 at 706. See also fn. 92.

[105] Royer, 48/75, [1976] 2 C.M.L.R. 619 at 644.

[106] Royer, 48/75, [1976] 2 C.M.L.R. 619 at 644.

[107] [1980] 3 C.M.L.R. 685 at 706 (emphasis added).

[108] See fn. 92 and fn. 104.

[109] Ibid.

[110] This can happen in the case of a denial of the right of residence, where the review procedure set out in Article 9(2) has to be requested by the non-national. It would appear that in Royer (48/75) the non-national chose to rely on national remedies.

[111] This was the case in Pecastaing (98/79), as the non-national appealed to the regular courts after having gone through the review procedure set out in Article 9(2).

[112] Unless, of course, this can be done within the fifteen days or one month period of grace.

[113] Articles 48(3) and 56(1).

[114] Article 1 of both directives.

[115] *See* Chapter 2A, pp. 66-67 and p. 70; Chapter 2B, p. 93.

[116] *See* Chapter 2A, pp. 79-81 and 2B, p. 108.

[117] Chapter 2B, p. 107.

[118] For obvious reasons the public health exception does not apply to companies.

[119] *See*, *supra*, p. 155.

[120] Article 1(1).

[121] *See* the discussion in Chapter 2A, pp. 82-83 and Chapter 2B, pp. 109-110.

[122] *See* *Bonsignore*, 67/74, [1978] 1 C.M.L.R. 472 at 488; *Rutili*, 36/75, [1976] 1 C.M.L.R. 140 at 155.

[123] *See* Chapter 2A, p. 83 and Chapter 2B, p. 110.

CHAPTER THREE

THE RIGHT TO PURSUE A LIVELIHOOD

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THE RIGHT TO PURSUE A LIVELIHOOD

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Chapter 3A

THE LEGISLATION

The List of Applicable Legislation

Treaty Provisions

Articles 48, 49, 52, 54, 55, 57, 58, 59, 60, 63, 66.

General Programmes

General Programme for the abolition of restrictions on freedom of establishment, issued pursuant to Article 54(1).

General Programme for the abolition of restrictions on freedom to provide services, issued pursuant to Article 63(1).

Secondary Legislation

(a) Employees

Council Regulation 1612/68, issued pursuant to Article 49.

(b) Self-Employed Persons (Directives marked with an asterisk also apply to employees)

Agriculture and horticulture: Council Directives 63/261 (L-E),[1] 63/262 (L-E), 65/1 (L-E-H), 67/530 (E), 67/531 (L), 67/532 (L-E), 68/192 (E), 68/415 (E), 71/18 (L-E-H).

Catering industry: Council Directives 68/367 (L-E-H), 68/368 (H).

Coal trade: Council Directives 70/522 (L-E-H), 70/523 (H).

Film industry: Council Directives 63/607 (L-E-H), 65/264 (L-E), 68/369 (L-E-H), 70/451 (L-E-H).

Financial institutions: Council Directives 73/182 (L-E-H), 77/780 (H).

Food manufacturing and beverage industry: Council Directives 68/365 (L-E-H), 68/366 (H).

Forestry and logging: Council Directive 67/654 (L-E-H).

Hairdressing: Council Directive 82/489* (H).

Health care professions: Council Directives 75/362*[2] (H), 75/363* (H), 77/452* (H), 77/453* (H), 78/686* (H), 78/687* (H), 78/1026* (H), 78/1027* (H), 80/154* (H), 80/155* (H).

Insurance: Council Directives 64/225 (L-E), 73/239 (H), 73/240 (L-E-H), 77/92 (H), 79/267 (H).

Lawyers: Council Directive 77/249* (H).

Manufacturing and processing industry: Council Directives 64/427 (H), 64/429 (L-E-H).

Mining, quarrying, prospecting and drilling: Council Directives 64/428 (L-E-H), 69/82 (L-E-H).

Miscellaneous activities: Council Directives 63/340 (L), 75/368* (L-E-H), 75/369* (L-E-H).

Public utilities: Council Directive 66/162 (L-E-H).

Public works: Council Directives 71/304 (L-E), 71/305[3] (H).

Real estate and other business services: Council Directive 67/43 (L-E-H).

Toxic products: Council Directives 74/556* (H), 74/557 (L-E-H).

Transport, travel, storage and warehousing: Council Directive 82/470* (H).

Wholesale and retail trade: Council Directives 64/222 (H), 64/223 (L-E-H), 64/224 (L-E-H), 68/363 (L-E-H), 68/364 (H).

All these directives are summarized in the Appendix.

General Introduction

Prior to the end of the transitional period[4] the right to earn a livelihood rested exclusively on the secondary legislation of the Council and national measures enacted pursuant to it.[5] In the case of employees the Council chose to proceed by way of a regulation, 1612/68, which was directly applicable in the Member States and thus obviated the need for national implementation. The regulation contains liberalising provisions, which proscribe national measures that vitiate the right of a non-national to earn his livelihood in another Member State, and equalising provisions, which assure the exercise of that right on an equal footing with nationals of the host state. It does not, however, address the need for the harmonisation[6] of non-discriminatory national rules that are capable of preventing an effective exercise of the right that the regulation seeks to guarantee.

There would seem to be two reasons for this omission. In the first place the regulation is general in scope and aims at securing the right to work throughout the Community for all workers regardless of the nature of their chosen activity. Harmonisation, on the other hand, must deal with specific matters that vary according to the individual activity in question. Rules that govern the use of toxic products, for example, will have little in common with those that affect insurance agents. The second reason for the omission may be that it was felt that most non-discriminatory rules dealing with economic activity concern the pursuit of that activity as a principal, so that employees could rely for the most part on their employers' satisfying the various national requirements.

Whatever the justification for the lack of harmonising provisions in Regulation 1612/68, it does cause problems for the employee. It may be that he is required to prove knowledge or ability before being allowed to take up a particular activity, or the position that he seeks may demand certain attributes such as good repute or sound physical and mental health. In the absence of harmonisation it may be difficult or impossible for the employee to satisfy these exigencies. The Council has recognized these potential obstacles to the freedom of workers to pursue their livelihood[7] and has included employees as beneficiaries of the harmonising provisions in many of its directives on self-employed activities.[8]

On the whole the immigrant worker poses uniform problems for all Member States of the Community, and he or she can be integrated into the national economy without substantial conflict with the traditional prerogatives of nationals of the host state. The situation is very different when it comes to the liberalisation of self-employed activities. The problems become at once more complex, as each Member State has to dismantle its particular restrictions in a particular area, and considerably more sensitive, as non-nationals acquire rights of access to jealously guarded national preserves such as farming or the professions. This is doubtless why, in the case of freedom of establishment and freedom to provide services, the Treaty provided[9] for the Council to agree beforehand through the medium of general programmes on its general approach and to set its own timetable within the parameter of the transitional period.[10]

The general programmes have been discussed before as they deal with the whole area of establishment and services, which includes the right of entry and residence[11] as well as the right to pursue a livelihood[12] and the right of equality.[13] They also specify when the harmonising devices of mutual recognition of qualifications and of coordination of national measures, which are provided for by Article 57 of the Treaty, should be considered, and they suggest the substitution of a transitional system where such mutual recognition or coordination is not possible.[14]

Although the general programmes may have been binding on the Council and obliged it to act according to their terms, they had no legal force to bring about the liberalisation that they envisage.[15] Articles 54(2) and 63(2) of the Treaty provide that this was to be achieved by the issuance of directives by the Council in accordance with the timetable set out in the general programmes. The choice of directives as the sole mechanism for establishing the right of the self-employed to pursue their livelihood throughout the Community takes into consideration both national sensibilities and the complexity of modifying the various discriminatory national laws. It was clearly advisable on both counts to permit national implementation under Community direction.

The directives on self-employed activities contain both liberalising and equalising provisions. Both are given in the summary in the Appendix, but it is the former that are at issue in this chapter. The directives also deal with harmonisation both along the lines suggested by the Treaty and the general programmes as well as by including other facilitative measures that have no such express authorisation. The Council finds the necessary authority in Articles 49, 54(2), 57, 63(2) and 57 of the Treaty.[16]

The relationship between these directives and the general programmes is very close. Prior to the decisions of the Court of Justice on the direct applicability of the Treaty, each directive began with a reference to the timetable in the general programmes.[17] Most also incorporate into their provisions the whole of Title I, which sets out the beneficiaries of the right to pursue a livelihood, and Title III, which enumerates the restrictions to be abolished.[18] The result is that in this area of personal mobility rights the general programmes retain their importance and are not completely superseded by subsequent secondary legislation.

The Position Prior to the End of the Transitional Period

Employees. As far as employed persons were concerned, the right that derived to them under Regulation 1612/68 and its forbears was as comprehensive as any that they could have obtained by direct recourse to the Treaty. Under Article 1(1) of the regulation they had the right "to take up an activity as an employed person, and to pursue such activity within the territory of another Member State," and under Article 3(1) no national measures applied to them that limited this general right. The only limitation on a worker's right to earn his livelihood would be caused by his inability to satisfy non-discriminatory requirements in the host state due to the absence of Community harmonising provisions.

Self-employed persons. Self-employed persons were not so fortunate during the transitional period, for the liberalisation of self-employed activities proceeded on a piecemeal basis.[19] As agreement was reached on a particular activity, a directive would be issued that permitted its pursuance throughout the Community by self-employed persons. Most of these directives either included or were accompanied by harmonising provisions.[20] Thus, although the self-employed only enjoyed a right to earn a livelihood in certain specified areas during the transitional period, they were assured of being able to exercise it effectively. Although some attempt was made by the Council to keep to the timetable set out in the general programmes, there were frequent delays and some areas were not liberalised until after the end of the transitional period[21] or until the Court of Justice declared Articles 52, 59 and 60 to be directly applicable in 1974.[22]

A good example of the Council's approach to self-employed activities is provided by the directives dealing with agriculture. Originally, under Directive 63/261, only persons who had worked as agricultural workers in the host state for at least two years were given the right to acquire land in any form for the pursuit of agricultural activities, whereas under Directive 63/262 all other persons or companies could only acquire land for this purpose that had been left abandoned or uncultivated for more than two years. Four years later Directive 67/531 made agricultural leases generally available to non-nationals, and Directive 67/530 allowed persons or companies who had been pursuing agricultural activities for more than two years by way of lease under Directive 67/531 or on abandoned or uncultivated land under Directive 63/262 to transfer to another holding irrespective of legal form.[23] All these directives were overdue, and the general right to acquire land for the purpose of farming immediately and irrespective of legal form, which pursuant to Title IV F.6 of the General Programme on establishment should have been accorded by the end of the transitional period, was withheld until the Court of Justice held the Treaty to be directly applicable. To end on a more positive note, it should also be noted that Directive 65/1 on the provision of agricultural services was on time as regards the right to provide technical assistance and ahead of schedule with respect to soil cultivation, tillage and activities other than those specified inTitle V C(d) of the General Programme on services.

Although the secondary legislation is paramount during this period, it flows, of course, from the Treaty and must be consistent with it. On two occasions there appears to be a discrepancy. Article 52 of the Treaty restricts the right of primary establishment to non-nationals, and both Articles 52 and 60 make the non-national's right to pursue a livelihood in another Member State subject to the same conditions that operate for nationals regardless, it could be argued, of any disadvantages that this may create for the non-national. Neither limitation is followed in the secondary legislation on self-employed activities. Title I of the General Programmes on establishment extends the right of establishment to any E.E.C. national, and Title III of both programmes includes among the restrictions to be eliminated legislation that applies irrespective of nationality but which disadvantages non-nationals.[24] The directives, by incorporating these titles into their provisions, adopt the approach of the general programmes. Both these apparent deviations have met with the approval of the Court of Justice.[25]

The Position After the End of the Transitional Period

The Court of Justice declared the provisions of Articles 48, 52, 59 and 60 of the Treaty to be directly applicable and directly effective in a series of decisions in 1974.[26] The effect of these decisions was to replace the secondary legislation and the national measures based on it as the ultimate source of the right to pursue a livelihood with the Treaty itself. Regulation 1612/68, the directives on self-employed activities and the national measures were thus relegated to the subsidiary role of providing closer articulation of the rather bald language of the Treaty articles,[27] and any deficiencies or gaps in the law could henceforth be made good by direct recourse to the Treaty. Only in the area of harmonisation did the secondary legislation retain its autonomous legal force, for non-discriminatory national laws that affect mobility rights are not dealt with by the Treaty. Only the directives, however, are capable of enjoying this autonomy, as Regulation 1612/68 does not contain any harmonising provisions.

The effect on the actual rights of E.E.C. citizens of the direct applicability of the Treaty provisions has been somewhat less than one might have supposed. It has made little if any difference to employed persons, for their rights under Regulation 1612/68 are as comprehensive as under Article 48 of the Treaty and considerably more specific.[28] Theoretically, direct applicability should have caused a dramatic change in the area of self-employed activities, for henceforth all was free of restrictions.[29] Unfortunately, the self-employed person wishing to avail himself of this new freedom will often find that he cannot conform to the laws of the host state without the help of harmonising measures. The Council, therefore, still retains much practical control over the right of self-employed persons to pursue a livelihood in another Member State, for it alone is empowered to issue the necessary harmonising legislation.[30]

FOOTNOTES

Chapter 3A

[1] L, E and H indicate respectively whether the directive contains any liberalising, equalising or harmonising provisions. Liberalising provisions are those that aim at the elimination of national measures that prevent a non-national from exercising his right to pursue a livelihood. Equalising provisions assure the non-national the exercise of this right on an equal footing with nationals. Harmonising provisions are concerned with making it possible for non-nationals to conform to the non-discriminatory general laws that attach to the pursuit of a particular livelihood in the host state.

[2] As amended by Directive 82/76, 1982 O.J. L43, p. 21. It should also be noted that Directives 75/362, 77/452, 78/686, 78/1026 and 80/154 contain certain liberalising and equalising provisions. These are not strictly necessary, as the rights in question now derive directly from the Treaty. They can, however, be considered "a closer articulation" of these rights - see Chapter 1, pp. 24-25.

[3] As amended by Directive 78/669, 1978 O.J. L225, p. 41.

[4] In fact this situation lasted a little longer, as it was not until 1974 that the Court of Justice stated that the Treaty provisions had become directly applicable and directly effective - see Chapter 1, pp. 19-21.

[5] See Chapter 1, pp. 10-11.

[6] Harmonisation is discussed in detail in Chapter 3C. See, also, Chapter 1, p. 3 and pp. 22-23.

[7] Part of the Preamble to Directive 74/556 reads as follows:

"Whereas, in so far as in Member States the taking up or pursuit of the activity in question is also dependent in the case of paid employees or the possession of general, commercial or professional knowledge or ability, this directive should also apply to this category of persons in order to remove an obstacle to the free movement of workers and thereby to supplement the measures adopted in Council Regulation 1612/68 of October 15, 1968 on freedom of movement for workers within the Community."

Cf. similar wording in the preambles to Directives 75/368; 75/369; 75/362; 77/92; 77/452; 78/686; 78/106; 80/154.

[8] Co. Dirs. 74/556, art. 1(3); 75/362, art. 24; 75/363, art. 6; 75/368, art. 1(2); 75/369, art. 1(2); 77/452, art. 18; 77/453, art. 3; 78/686, art. 23; 78/687, art. 7; 78/1026, art. 17; 78/1027, art. 2; 80/154, art. 19; 80/155, art. 5.

The recognition of the problems of employees seems to have come quite late, for all these directives are subsequent to the decisions of the Court of Justice on the direct applicability of the Treaty.

[9] Articles 54(1), 63(1).

[10] Annex IV of the General Programme on establishment refers to all activities "not dealt with in the other Annexes" in order to ensure, vainly as it turned out, that all self-employed activities would be liberalised by the end of the transitional period in accordance with the Treaty.

[11] Titles I and II.

[12] Title I~~II~~.

[13] Titles III and VII of the General Programme on establishment, Titles III and IV of the General Programme on services.

[14] Title V of the General Programme on establishment and Title VI of the General Programme on services.

[15] *See*, Chapter 1, fn. 33. If the general programmes were indeed binding on the Council, this did not prevent it from failing to keep abreast of the timetable for liberalisation. Many areas, the professions and direct life insurance for example, were not even liberalised by the end of the transitional period.

[16] *See* Directive 80/154, which is based on Articles 49, 57 and 66 and Directive 69/82, which is based on Articles 54 and 63.

[17] *See*, *e.g.* the Preamble to Directive 63/262:
"Having regard to the General Programme for the abolition of restrictions on freedom of establishment, and in particular Title IV thereof."

Title IV sets down the date for the particular liberalisation in question. It should be noted, however, that the reference to the timetable is not a guarantee that the directive was on schedule. Directive 63/262, for example, was 16 months overdue.

[18] A perusal of the summary of the legislation will confirm this widespread practice.

[19] This is reflected in Article 4 of Directive 73/148, which provides for the grant of permanent residence to self-employed persons wishing to pursue activities "when the restrictions on these activities have been abolished pursuant to the Treaty."

[20] *See* the summary of the legislation in the Appendix.

[21] *E.g.* the right to establish oneself in order to provide agricultural and horticultural services that was granted by Directive 71/18.

[22] *E.g.* itinerant traders, the professions, and direct life insurance.

[23] Other examples of such piecemeal liberalisation can be seen from going through the summary of the directives. For example, wholesale trade was liberalised pursuant to Directive 64/223 with the exception of medicinal and pharmaceutical products, toxic products and coal. Trade in toxic products and wholesale trade in coal were not liberalised until after the

end of the transitional period by Directives 74/557 and 70/552 respectively. Trade in medicinal and pharmaceutical products was never liberalised by Council directive, but presumably it is now permitted because of the direct applicability of the Treaty.

[24] Title III B of the General Programme on establishment; Title III A, para. 4, of the General Programme on services.

[25] See Chapter 1, pp. 31-34.

[26] France (167/73), Reyners (2/74) and van Binsbergen (37/74). See Chapter 1, pp. 19-26 for a comprehensive discussion of these cases and their ensuing effect on the mosaic of community law.

[27] The Court appears to deny even this role to the directives on self-employed activities, but they clearly are capable of fulfilling this subsidiary role - see Chapter 1, pp. 24-25 for a comprehensive discussion of the matters dealt with in this paragraph.

[28] See, supra, p. 184.

[29] It is interesting to note the change in the preamble to the Council's directives. Before the Reyners decision (2/74) the reference was to the general programmes and their timetable as the justification for the directive - see fn. 17. After Reyners (2/74) references to the general programmes give way to such formulations as this one from Directive 75/362 on the mutual recognition of medical qualifications:

"Whereas, pursuant to the Treaty, all discriminatory treatment based on nationality with regard to establishment and provision of services in prohibited as from the end of the transitional period;..."

[30] Thus, a continental European notary cannot pursue his livelihood in another Member State as he is not included as a beneficiary of Directive 77/249, which facilitates the effective exercise of the freedom to provide legal services.

Chapter 3B

THE SUBSTANCE OF THE RIGHT

INTRODUCTION

The right to pursue one's livelihood in another Member State has slightly different connotations depending on whether one intends to work in an employed or self-employed capacity, and, in the latter case, whether one will be setting up a business in the host state or providing services there on a temporary basis.

For the employee it means, according to Article 1(1) of Regulation 1612/68, a general right "to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State...." So stated, it would appear to include the right to work in another Member State for a domestic employer even where there is no provision of services, a possibility which, although consistent with Article 48(1) of the Treaty, runs counter to the Community rules on entry and residence.[1]

The rights of self-employed persons vary. In the case of a person wishing to establish his own business in another Member State, the right to pursue a livelihood would permit him to do this in whatever way he wishes - through a sole proprietorship, a partnership or a company[2] - and, at his option, either by transferring his primary establishment or by opening up a secondary establishment in the form of an agency, branch or subsidiary.[3] For providers of services, on the other hand, it entails the general right to provide services for clients in another Member State[4] and the specific right to do so by pursuing the activity in the host state itself[5] "on a temporary basis, without establishing themselves and for a length of time appropriate to the nature of the services being performed, their centre of operations remaining fixed in another Member State."[6] Directives 65/1 and 67/654 also permit providers of services to carry on in the host state "the preliminary operations necessary for the performance of the service provided," such as "advertising, canvassing, and the conclusion of contracts."[7] Such activities, it is suggested, flow directly from the right to do business in another Member State and should be generally available to all providers as well as to persons who are investigating the possibility of establishing themselves.[8]

The right to pursue a livelihood is to be distinguished from the right to equal treatment in the work place. It procures for the non-national the basic right to work at all, whereas the right to equality aims at ensuring that this basic right is exercisable under the same conditions as nationals. For example, if non-nationals are permitted to work in factories, this gives them the right to pursue their livelihood even if they do not benefit in the same way as nationals from minimum wage legislation and redundancy protection. The obligation to apply these laws to non-nationals derives from their right to equality. However, where the discriminatory conditions are very onerous, they may infringe the right to a livelihood by making its exercise so unattractive that the right itself becomes worthless. Thus, if, in the above example, the non-national factory worker were to be offered a miserable pittance, his right to work in the factory would be reduced to a mockery, and the discriminatory conditions of employment would have affected the basic right to work itself. Likewise, in the case of self-employed persons, the inability to use key employees of non-E.E.C. nationality may cause the non-national employer to renounce his attempt to do business in another Member State.

The dividing line between the right to pursue a livelihood and the right to do so on an equal footing with nationals is not always precise, but the essence of the distinction between the two rights is whether the national measure prevents or just hinders the non-national's pursuit of his livelihood. Title III of the general programmes, which is incorporated into the directives,[9] covers both types of national measure in its general statement of principle[10] and in its enumeration of specific measures to be eliminated.[11]

RESTRICTIONS ON THE RIGHT TO PURSUE A LIVELIHOOD

Introduction

National measures that are capable of preventing a non-national from pursuing his livelihood can be divided into three broad categories. The first of these comprises direct prohibition of the right to do so as well as measures that have an equivalent effect, such as not permitting non-nationals to join professional or trade organizations where membership is necessary in order to do business. Next there is the potential prohibition of the right entailed by subjecting its exercise to the fulfilment of prerequisites. These prerequisites can be further divided into substantive requirements, such as the need for prior residence in the host state or for possession of its qualifications, and formal requirements, such as the granting of an authorization or a work permit. Substantive prerequisites are more onerous, as they require a real effort from the non-national; he may, for example, have to take an examination or take up residence in the host state prior to commencing his activities. Formal prerequisites, on the other hand, only require an official act by the host state upon the request of the non-national. However, if the authorization or permit can only be obtained upon the fulfilment of certain pre-conditions, it becomes a substantive prerequisite. Similarly, the obligation to join a professional or trade organization is a formality as long as it is merely a question of requesting enrolment; it becomes a substantive prerequisite if enrolment is premised on the passing of an examination. Finally, there is the indirect prohibition of the right that results from a Member State attaching such onerous conditions to its exercise that it becomes worthless. Examples of such conditions have been given above.

Discrimination in Law

The application to non-nationals of any of these categories of restrictions on the basis of nationality equals discrimination in law and is prohibited by the Treaty[12] and the secondary legislation.[13] The only exceptions are formal prerequisites that arise from the operation of Community law,[14] for a Member State has the right to ensure that an immigrant is covered by the relevant Community rules on personal mobility and meets the requirements of valid national laws of general application.[15] It should also be noted that nothing prevents a Member State from attaching purely national formalities to the exercise by non-nationals of their right to pursue a livelihood, provided that they serve an informational purpose.[16] A non-national may be obliged to obtain a work permit, for example, but his right to work cannot depend on his possession of it.[17]

Discrimination in Fact

The Treaty does not expressly prohibit discrimination in fact in the area of personal mobility. Article 48(2) comes close to doing so, as its reference to "the abolition of any discrimination based on nationality"[18] could be taken to include national measures of general application that inhibit non-nationals by not taking into consideration the objective differences in their situation. The general requirement of prior residence in the host state, for instance, will clearly put non-nationals at a particular disadvantage and could come within the definition of "any discrimination." Articles 52 and 60, on the other hand, only stipulate that non-nationals be allowed to pursue their activities under the same conditions - i.e. general laws - as nationals. This approach is called national treatment, and it would ostensibly permit the requirement of prior residence and similar laws of general application that effectively favour nationals. Both the Council and the Court of Justice, however, have interpreted Articles 52 and 60 more broadly so as to include a prohibition on discrimination in fact as well as in law.[19] _A fortiori_, the same liberal interpretation has been applied to the less restrictive wording of Article 48(2).[20]

Discrimination in fact is considerably more subtle than overt discrimination in law, and its detection involves a careful examination of apparently neutral legislation in search of discriminatory criteria. However, not all national measures of general application that deter personal mobility are necessarily discriminatory in fact. A Member State may set down taxation rates or social security benefits that are a discentive to migration because they compare unfavourably with those in the home country, but it can hardly be said that such measures affect non-nationals any differently than nationals.[21] And even where a national measure does put non-nationals at a disadvantage, it will not constitute discrimination in fact at Community law if the criteria upon which it is based can be objectively justified.[22] Thus, the Court of Justice accepted the validity of a Dutch law that had the effect of requiring a British manpower agency, which was already licensed in the United Kingdom, to obtain another licence in the Netherlands because of the peculiarities of the Dutch labour market.[23] Similarly, it upheld a French law that required all veterinarians to possess French qualifications and put non-nationals to the enormous inconvenience of having to re-qualify in order to practice in France, as the measure could be justified by the need to protect the public and maintain professional standards.[24] If, however, the objective justification is lacking, as where the host state has recognized the licensing regulations or professional qualifications of another Member State as equivalent to its own, such measures would indeed constitute discrimination in fact.[25]

On some occasions the Court of Justice has added the requirement of proportionality to that of objective justification so that national measures will be considered discriminatory in fact, despite their objective justification, where the restrictions they place on personal mobility are out of proportion to the demands of public policy advanced to justify them. The Court applied this additional requirement in Coenen (39/75) to a Dutch law that stipulated that all providers of insurance services reside within the Kingdom. Noting that such a stipulation practically nullified the freedom to provide these services in the case of non-nationals, who would normally be established in another Member State, the Court warned that it was only acceptable "if the member-State does not have other less stringent measures available to ensure compliance with...its professional rules."[26] The Court has taken a similarly dim view of the practice in some Member States of making non-nationals with valid domestic driving licences take another road test. In its view, the contribution to road safety does not outweigh the restriction involved.[27]

With the Court's jurisprudence in mind, it is possible to say that national measures of general application will only constitute discrimination in fact at Community law where a) they put non-nationals at a disadvantage compared to nationals, and b) lack an objective justification or, alternatively, represent a disproportionate interference with personal mobility considering what they are supposed to achieve.[28]

Where discrimination in fact does occur within the Community, it generally falls into one of two categories. In the first category, which is met more frequently, are those national measures that accord a benefit but which are based on criteria that the non-national will not normally be able to meet. The requirement of national qualifications in order to exercise a profession is an obvious example of such a criterion. So, too, was the legislation at issue in Ugliola (15/69), a case which deals with a non-national's right to equal treatment at work. The action was originally brought by an Italian worker in Germany, whose military service in Italy was not counted towards the calculation of his job seniority in the same way as German military service would have been. The German government claimed, somewhat disingenuously, that the legislation was not discriminatory because it entitled any worker, irrespective of nationality, to have his period of service in the German armed forces taken into consideration in this fashion. This claim was firmly rejected by Advocate-General Gand, who pointed out that "the performance of military service in the army of a State other than that of which one is a national is a hypothesis which even the German government itself considers theoretical."[29] The Court sided with the Advocate-General and held that, as the benefit accorded by the legislation would normally only accrue to German nationals, the law was discriminatory in fact.[30]

The second category of national measures are those that entail a disadvantage and are based on criteria that are normally met only by non-nationals. An Irish law prohibiting fishing boats over a certain size from fishing in Irish waters is an example of this category; only Ireland's Community partners possessed boats large enough to come within the prohibition, while nearly all the Irish vessels were small enough to qualify for fishing rights. The law was successfully challenged by the Commission before the Court of Justice.[31]

Harmonisation

Because Community law only requires the elimination of national measures that discriminate either in law or in fact against non-nationals, many general measures within the Member States will remain valid despite the fact that they prevent the exercise by non-nationals of their right to pursue a livelihood. For example, where the host state validly stipulates possession of its qualifications as a prerequisite to the exercise of a particular profession within its territory, a non-national will be barred from this activity unless he is prepared to go to the trouble of re-qualifying. The only way of overcoming this type of obstacle is to provide a mechanism whereby non-nationals can conform to valid general laws. This harmonising process, which can take various forms, is authorised by the Treaty[32] and set out in more detail in the general programmes.[33] It is particularly crucial with respect to the right to pursue a livelihood and is dealt with in Chapter 3C.

Private Discrimination

It is not clear to what extent the Community rules against discrimination apply to private individuals. The only clear principle to emerge from the Court's judgments is that the rules do apply to any collective regulation of employment or self-employed activities. In Walrave and Koch (36/74)[34] and Donà (13/76),[35] for example, the Court held that the prohibition against the use of non-national sportsmen imposed, respectively, by the International Cyclists' Union and the Italian Football Federation was capable of incompatibility with the Treaty rights of self-employed persons. In Walrave and Koch (36/74) the Court also expressly approved Article 7(4) of Regulation 1612/68, which prohibits discrimination against non-national employees in "[a]ny clause of a collective agreement or individual agreement or any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work...."[36]

It has been suggested that private employers are bound entirely by Article 48 of the Treaty and its subsidiary legislation,[37] but the suggestion has been contested[38] and it has not been taken up by the Court of Justice. The only reference to the individual acts of private employers is contained in Article 6(2) of Regulation 1612/68, which permits an employer to subject a non-national worker to a vocational test if he expressly requests this when making the offer of employment. It would seem that this exception implies that a similar test at any other time would contravene Community law, which does represent an extension of the prohibition against discrimination to private employers. There is also support in the Court's jurisprudence for such an extension. In Walrave and Koch (36/74) the Court took the view that to confine the application of Community rules to the regulation by public authorities of self-employed activities would leave the field clear for private associations to take over this task and undermine the fundamental objective of the Treaty.[39] The same point could be made in the case of private employers, who stand in much the same relationship to employees as do private associations to the self-employed. There is reason, therefore, to take seriously the contention that private employers are bound by the Community rules against discrimination.

RESTRICTIONS ON THE RIGHT TO TAKE UP EMPLOYMENT

Introduction

The right to take up employment in another Member State is guaranteed by Article 48, which can be invoked directly before national courts.[40] The right is, however, spelled out in more detail in Regulation 1612/68, which, in addition to a general prohibition on national measures that restrict its exercise,[41] enumerates specific national practices that are to be eliminated.[42] Other discriminatory practices that are mentioned in Title III of the general programmes, such as exclusion from social security schemes and the denial of the right to join professional organisations, can also affect employees. The measures that are dealt with in Regulation 1612/68 nevertheless represent the most common obstacles to the right to take up employment and deserve closer study. They fall into the three categories mentioned earlier and can take the form of discrimination in law or in fact. The latter type of discrimination is discussed separately.

Direct Prohibition of the Right and Measures Having an Equivalent Effect

Direct prohibition by a Member State of the employment of non-national workers is eliminated by Articles 1(1) and 3(1) of the regulation. The first article does this in a positive way by establishing the right to work,[43] while Article 3(1) stipulates that national measures contrary to this right shall not apply to non-nationals. Both articles were applied by the Court of Justice in France (167/73), when it held the requirement of French nationality for certain key positions on board French ships to be incompatible with Community law. In Italy (159/78) the Court similarly rejected the requirement of Italian nationality for customs agents, although, in this case, it relied directly on Article 48.

Measures having an effect equivalent to a direct prohibition are also covered by the provisions of Articles 1(1) and 3(1) of the regulation as well as by other specific provisions. Article 3(2), for example, disallows the use of special recruitment procedures for non-nationals[44] and restrictions on advertising employment vacancies in other Member States.[45] Any curtailment of the freedom to exchange offers and applications and to conclude employment contracts with non-nationals is similarly proscribed.[46] Outright quotas on the hiring of foreigners,[47] which will cause employers not to employ them freely, and the granting of benefits contingent upon the employment by an undertaking of a minimum percentage of nationals,[48] which will have the same result, are not to apply to the detriment of E.E.C. nationals. The first of these last-mentioned provisions was applied by the Court in France (167/73), for, in addition to the requirement of nationality referred to above, French law also set a ratio of three French nationals to one foreigner in the make-up of the crew of French ships. There is no reference in the regulation to the denial of the right to join professional or trade organizations where membership is necessary, but the non-national is assured of trade union membership,[49] absence of which can more frequently prejudice his right to employment. The regulation's silence on the question of professional and trade organisations may reflect a belief that this matter affects primarily self-employed persons.[50] Nevertheless, the right to join for the employed is implied by Article 1(1) and 3(1) of the regulation.[51]

Indirect Restrictions on the Right

Indirect restrictions on the non-national's right to employment in the form of prerequisites or exceptionally onerous conditions of employment are also dealt with by Regulation 1612/68. Article 3(1) establishes the general principle that Member States may not subject this right "to conditions not applicable in respect of their own nationals,"[52] which covers the discriminatory application to non-nationals of either type of indirect restriction. More specifically, with respect to discriminatory prerequisites, Article 3(2)(c) prohibits the requirements of prior residence in the host state and prior registration at one of its employment offices, while Article 6(1) forbids making the recruitment of non-nationals dependent "on medical, vocational or other criteria which are discriminatory on grounds of nationality.[53] This last provision could be seen as disallowing essential formalities that arise from the operation of Community law, but this cannot be so. A Member State is entitled to make sure that a non-national is covered by the Treaty,[54] and in certain directives on self-employed activities that also apply to employees this entitlement is recognized.[55] The regulation does not mention the exclusion of non-nationals from social security benefits arising from contracts of employment even though the prospect of no pension and no medical and unemployment insurance protection would surely render the right to take up employment quite worthless.[56] However, such an exclusion probably contravenes the general principle set out in Article 3(1), and, in any case, the right to participate in the social security schemes of other Member States is expressly conferred by Regulation 1408/71.[57]

Discrimination in Fact

Restrictions of any category on the right to take up employment that apply irrespective of nationality but discriminate in fact against non-nationals are prohibited by Article 48 of the Treaty, as interpreted by the Court of Justice,[58] and by Article 3(1) of Regulation 1612/68.[59]

This prohibition will not affect national measures that forbid absolutely certain types of employment or lay down onerous conditions for their pursuit, as such measures will apply with equal force to both nationals and non-nationals. If a national cannot be employed as a prostitute or if he can only work in a casino subject to severe restrictions, a non-national has no right to expect more lenient treatment. If these measures are applied on the basis of residence, however, they will lose their even-handedness. Restricting access to a job or to acceptable conditions of employment to persons resident within the host state[60] will discriminate against persons who work in one Member State while residing in another and against people who apply for employment from outside the host state or who are hired in another Member State. In all these cases non-nationals are the ones most likely to be disadvantaged so that there will be discrimination in fact, unless the criterion of residence can be objectively justified. It is difficult to see how this could be done.[61]

Most measures having an effect equivalent to direct prohibition, such as quotas and restrictions on the freedom to contract, tend by their very nature to be incapable of even-handed application. Some, such as a special hiring procedure for a particular type of employment, could be used in the case of nationals as well and, provided that non-nationals are given an equal opportunity to be hired, would be unobjectionable. On the whole, though, the whole purpose behind these equivalent measures is to prevent or curtail the employment of non-nationals. Theoretically they could be given the semblance of neutrality by confining their application to non-residents, but it would be just as difficult to justify the use of this criterion here as in the case of outright prohibition.

Formal prerequisites that apply irrespective of nationality will not be discriminatory unless they are based on an unjustified use of the criterion of residence. If a national must obtain a permit or be accepted by a professional or trade organisation in order to take up a certain employment, a non-national must expect to do the same. A problem may arise, however, where the fulfilment of the formal prerequisite involves the exercise of discretion or the elements of time and cost. As long as the discretion is exercised in such a way as to give the non-national an equal opportunity to fulfil the prerequisite and provided that he is not subject to greater delays or expense than nationals, there is still no discrimination. Where this is not the case, there is discrimination in law as apparently neutral requirements are being used to discriminate openly against non-nationals.

Substantive prerequisites will invariably disadvantage the non-national even where they apply to nationals as well, for they require the non-national to have done something that is more easily done by nationals. They will therefore need to be objectively justified and to meet the test of proportionality. The most frequent examples of such prerequisites are prior residence in the host state, prior registration with its employment services, possession of its qualifications and knowledge of its language. Prior residence and prior registration are difficult to justify, although it is by no means impossible in the case of residence. A Member State could, for example, reasonably require a prospective social worker to have resided in the area where he is to work in order to familiarise himself with the type of problems he will encounter. The other two prerequisites are easier to justify. With respect to linguistic ability, Article 3(1) of the regulation specifically permits this prerequisite where it is necessary "by reason of the nature of the post to be filled." The regulation contains no similar provision on possession of the host state's qualifications, but the Court of Justice has made it clear that this is a legitimate requirement in view of the need to maintain standards and protect the public.[62] But where this objective justification is lacking, as where the host state has recognized the non-national's domestic qualifications as equivalent to its own, the requirement is discriminatory in fact.[63] Because of the prevalence and acceptability of the prerequisite of qualifications, many of the directives that provide harmonising measures in this area for self-employed persons apply to employees as well.[64] Another substantive prerequisite that may affect employees but is not mentioned in Regulation 1612/68 is the requirement to take an examination in order to be accepted into a professional or trade organization. However, this prerequisite arises more often in connection with self-employed activities and is dealt with in that context later.[65]

Employees of Providers

Different considerations apply to persons who go abroad to provide services. Substantive prerequisites and formal prerequisites that take time to fulfil will often represent for these people measures equivalent to a direct prohibition on their right to work, for, by the time the prerequisites have been met, the opportunity to provide the services may well have disappeared. However, the problems of the employees of providers affect primarily the right of their employers, for employees do not have any independent right to provide services in another Member State in the same way as they can choose to seek employment there. For this reason the problems will be discussed in the following section on self-employed persons.

RESTRICTIONS ON THE RIGHT TO PURSUE SELF-EMPLOYED ACTIVITIES

Introduction

The right to pursue self-employed activities in another Member State by way of either establishment or the provision of services is now guaranteed by Articles 52 and 60 of the Treaty, respectively, and can be enforced, if necessary, by direct reliance on these provisions.[66] As with the right to employment, this right is also articulated in more detail by the secondary legislation and, in this case, by the general programmes as well. The Court of Justice has recognized the relevance of the general programmes[67] but has somewhat cavalierly rejected the directives that liberalize self-employed activities as superfluous in view of the direct applicability of the Treaty.[68] This attitude is open to criticism,[69] for the directives in question provide concrete examples of invalid national restrictions and will be referred to in this study for that reason. Some of the harmonising directives, which the Court has accepted as relevant,[70] are also pertinent, as they contain provisions that relate to the liberalisation of self-employed activities.

Like Regulation 1612/68, Title III of the general programmes proceeds from a general prohibition on measures that restrict the right of self-employed persons to pursue their livelihood[71] to specific examples of such measures.[72] The directives, by incorporating Title III,[73] adopt both the general and specific prohibitions as well as singling out for elimination particular objectionable practices in effect in the various Member States.[74] It is also possible to draw on Regulation 1612/68 for additional examples of obstacles to the pursuit of self-employed activities. For instance, a restriction on the dissemination of opportunities for professionals to national newspapers would constitute such an obstacle.[75] All these restrictions fall into the same three categories discussed earlier and are prohibited whether they take the form of discrimination in law or in fact.[76]

Different considerations apply to providers of services because of the temporary nature of their activities and the short notice at which they are often undertaken. The special problems of these persons will be discussed separately.

Direct Prohibition of the Right

Discrimination in law. Direct prohibitions on the pursuit of any self-employed activity by non-nationals are proscribed by Title III of the general programmes both as a general principle[77] and specifically.[78] In addition the directives prohibit particular national measures,[79] such as the requirement of French nationality for the post of *mandataire et approvisionneur* at *Les Halles* in Paris[80] and the need for Italian nationality in the case of professional valuers.[81] Directive 63/607 on the film industry, which is one of the few directives not to incorporate Title III, prohibits restrictions on the importation and distribution of non-national films,[82] which represent, in effect, a direct prohibition on the right of non-nationals to provide services in other Member States in the form of cinematic entertainment.

Examples of unsuccessful attempts to bar non-nationals from a particular activity abound in the case law of the Court of Justice and of the national courts. In Reyners (2/74), for example, the Court of Justice held that a Belgian law prohibiting a qualified Dutchman from being admitted to the Belgian bar was invalid, while in both Walrave and Koch (36/74), and Donà (13/76) it disallowed a regulation of a private sporting association that required athletes to have a particular E.E.C. nationality. In Haug (U.K.) the Comptroller of the Patent Office ruled that a German citizen has the right to become a patent agent in the United Kingdom.

Discrimination in fact. Where a private individual or company is not allowed to engage in an activity in a Member State, the prohibition will invariably apply with equal force to nationals and non-nationals alike. If a German company cannot set up a private postal service in the Federal Republic, there is no discrimination involved in applying the same restriction to an English company. Nevertheless, discrimination in fact was alleged in Ameyde (90/76) by a Dutch insurance claims adjuster who was formerly used by the foreign insurance companies that covered foreign motorists travelling in Italy. As a result of a reorganization of the Italian insurance industry, coverage of foreign motorists was henceforth permitted for insurance companies based in Italy, none of which used independent adjusters. The plaintiff thereupon lost all his business in Italy and claimed that this was a consequence of the new Italian law. The Court of Justice accepted that the reorganization was indirectly responsible for the plaintiff not being able to provide services in Italy any longer but rejected the charge of discrimination in fact, pointing out that it was the decision of the Italian-based insurance companies not to use independent adjusters rather than the reorganization as such that was the direct cause of the plaintiff's misfortune.[83]

The substitution of the criterion of nationality by that of residence will not normally have any prejudicial affect on non-nationals wishing to set up a primary establishment in another Member State, as they will invariably take up residence there in order to do so. It will, however, disadvantage non-nationals who wish to remain in one Member State while setting up a secondary establishment elsewhere in the Community or who provide services in another Member State. In the case of secondary establishment there can rarely if ever be a good reason for basing the right to set it up on the physical presence of the entrepeneur in the host state, but the situation with respect to providers of services is more complex. In van Binsbergen (33/74) the Dutch government sought to justify the requirement of residence for persons wishing to provide legal representation before Dutch social service courts on the ground that non-resident providers, having no establishment within the Kingdom, were not otherwise susceptible of control by the national authorities. The Court of Justice was prepared to accept that the requirement of residence for providers could be justified in this way but only where the activity in question was subject to professional rules in the host state.[84] Such was not the case in van Binsbergen (33/74), and the Dutch law was held to be incompatible with the Treaty.[85] In a later decision, Coenen (39/75), which concerned the application of the criterion of residence to eligibility for registration as an insurance broker, the Court adopted a more negative attitude towards the restriction. Noting that the requirement of residence has the practical effect of preventing non-nationals from providing services in another Member State, it declared that the Member State applying the requirement must show not only an objective justification for it but also the unavailability of less stringent measures that would ensure compliance with national rules.[86] Otherwise, in the Court's view, the requirement of residence for providers would represent a disproportionate interference with personal mobility.

The Dutch court, to which the matter was referred back, took the Court of Justice at its word and held that the requirement of residence was indeed disproportionate considering that the non-resident provider had an office in the Netherlands, at which his books and documents could be inspected.[87] In conclusion, it should be noted that Directive 77/249 on the facilitation of the provision of services by lawyers expressly forbids the requirement of residence.[88] This is the preferable approach, but, unfortunately, the directive stands alone in this regard.

Measures Equivalent to a Direct Prohibition

Discrimination in law. Various national measures that make it as impossible for a non-national to take up a self-employed activity as a direct prohibition are also proscribed by Title III of the general programmes. Some of these equivalent measures are common to establishment and services; others are not.

Among the measures that affect both establishment and services are "provisions and practices which, in respect of foreign nationals [non-nationals] only, exclude...the power to exercise rights...where the professional or trade activities of the person concerned necessarily involve the exercise of such power."[89] Examples of rights that cannot be denied to non-nationals are contractual capacity,[90] participation in state contracts,[91] obtaining licences and authorisations,[92] acquisition and use of personal, real and intellectual property,[93] access to credit and state aids,[94] and legal standing before the courts.[95] Title III of the General Programme on establishment also includes the right to join a trade or professional organization,[96] but this provision is omitted in the General Programme on services. This is strange, as it is just as essential for a provider of services to be able to join an organization of which membership is necessary in order to pursue an activity in the host state. The omission may be due to a belief that the obligation to join such organizations should be removed altogether for non-national providers or that membership should be granted automatically.[97] This is indeed the approach that is adopted in some directives,[98] but it is by no means universal.[99] Any resulting ambiguity in the position of non-national providers is resolved, however, by an express provision in the directives that do not contain special arrangements for providers according them the same right of membership in professional and trade organizations as nationals.[100] Since the Treaty is now directly effective, this right flows as well from Articles 52 and 60 for all non-national self-employed persons.

Some specific national provisions that deny non-nationals the power to exercise essential rights are singled out for elimination by the directives.[101] In Directive 64/428, for example, a United Kingdom and an Italian law limiting the issue of licences for oil and natural gas exploration and exploitation, respectively, to nationals are disallowed.[102] Directive 69/82 on mining, quarrying, prospecting and drilling and Directive 66/162 on public utility undertakings both require the abolition of national rules and practices that prevent non-nationals from being granted licences or authorisations to engage in the activities that they liberalize.[103]

Other measures having equivalent effect apply exclusively to either establishment or services. Thus, a prohibition on the movement of an item to be supplied or of equipment to be used in the course of providing services will affect only the provider, as will prohibitions on the transfer of funds needed to perform or pay for services or on nationals of the host state using the services of a non-national. Conversely, a prohibition on non-nationals becoming members of companies and firms or holding positions of responsibility within them will prejudice only those persons who wish to set up or join such undertakings in the host state. Accordingly, this last practice is proscribed in Title III of the General Programme on establishment,[104] while all the others are required to be abolished by the General Programme on services.[105]

Discrimination in fact. It is clearly impossible for a Member State to apply on a general basis prohibitions on the exercise of rights that are essential for carrying on a certain activity, for otherwise there would be little point in permitting its pursuit in the first place. It is similarly difficult to envisage how any of the other equivalent measures could be used against nationals as well as non-nationals as long as the activity to which they relate is legal. Thus, the only possibility for a non-discriminatory application of these measures would be the criterion of residence, but the use of this criterion is hard to justify. It can, however, be done in the case of non-resident providers on the basis of the need to ensure compliance with national rules governing the pursuit of an activity.[106] In Coenen (39/75) a non-resident provider of insurance services was denied the registration necessary to do business in the Netherlands, and the Court of Justice accepted that such a denial would be compatible with Community law if no less stringent means of enforcing national rules were available.[107] But the criterion of residence can never be applied to prevent the transfer of funds necessary to pay for services rendered, as Directive 63/340 prohibits any restrictions on such transfers.[108]

Community formalities and national formal prerequisites that take time to fulfil as well as all national substantive prerequisites can represent for the non-national provider of services additional measures equivalent to a direct prohibition, if he has to pursue an activity at short notice and within definite time restraints. A British surgeon, for example, who is called upon to perform a critical operation in France but who has to wait a few days or weeks to be accepted by the French medical association and to have his qualifications recognized by the French authorities, will have to decline the request for his services. Clearly special arrangements must be made in such cases, and these will be discussed in the following section on prerequisites.

The Subjection of the Right to the Fulfilment of Prerequisites

Formal prerequisites - discrimination in law (permits, authorisations, and proforma membership in professional and trade associations). The imposition by a Member State of formal prerequisites on the exercise of a self-employed activity that apply exclusively to non-nationals is the subject of a general[109] and specific[110] prohibition in Title IIIA of the general programmes. The directives adopt Title IIIA[111] as well as enumerating particular instances of discriminatory practices in the Member States that must be eliminated. France, for example, required non-nationals to obtain a special permit - *carte d'identité d'étranger commerçant* - in order to do business within its territory,[112] while in Denmark non-nationals were not allowed to acquire real property - a measure capable of equivalent effect to a direct prohibition - without an authorisation from the Ministry of Justice.[113] Sometimes a particular activity had its own requirements. An instance is the trade in carrier pigeons in Italy, which could be carried on by non-nationals only by special permission.[114] All these various permits and authorisations were abolished pursuant to the directives,[115] or, in the absence of a directive, by the Treaty itself when it became directly effective.

Companies as well as individuals benefit from the liberalisation of self-employed activities,[116] and certain early directives emphasize in their preamble that this means that "no company or firm may be required, in order to obtain the benefit of such measures [of liberalisation], to fulfill any conditions and in particular no company or firm may be required to obtain any special authorisation not required of a domestic company or firm wishing to pursue a particular economic activity."[117] The issue raised by this wording is whether it gives a right to automatic corporate recognition in the host state.[118] The argument in favour of such a view supposes that the formalities involved in recognition constitute the "special authorisation not required of a domestic company." It is suggested that this supposition is erroneous. The authorisation and conditions referred to in the preambles have to do solely with restrictions on the right of a company or firm to engage in a certain activity; they have no more to do with corporate recognition than the incorporation of Title III into the directives affects the rights of individuals to entry and residence. Corporate recognition and the rights of entry and residence are governed by a separate set of rules quite distinct from those that regulate the right to pursue a livelihood. All that the wording of the preambles serves to emphasise is that companies must also be exempt from discriminatory prerequisites, including formal ones, on this latter right.

The two exceptions to the rule against discriminatory formal prerequisites are national formalities that accompany the right of non-nationals to pursue business activities without making its exercise dependent upon their fulfilment[119] and formalities that arise from the operation of Community law. The latter formalities concern proof by a non-national that he is entitled to the protection of the Treaty and the operation of national rules that derive from a Community scheme of harmonisation.[120] Directive 75/362, for example, specifically allows a host state to verify that a non-national provider of medical services has an established practice in another Member State and is providing bona fide services within its territory;[121] it also sets out a mechanism to be adopted by the Member States that will enable non-national doctors to prove more easily to the authorities of the host state that they possess the necessary good character and physical and mental health.[122] Such Community formalities, however, can become an obstacle to free movement if they take an inordinately long time to complete, and it is somewhat surprising that this matter has not been more widely regulated by Community secondary legislation. As it is, only the health care directives on mutual recognition of qualifications lay down any time limit for the completion of these formalities, but even here the time limit of three months applies only to proof of good character and physical and mental health by non-nationals wishing to establish themselves.[123] It is suggested that this time limit should apply to all Community formalities relating to establishment,[124] whether they regulate the enjoyment of a Treaty right or are part of a Community harmonisation scheme. Otherwise measures that exist to facilitate the exercise of the right to pursue a livelihood can become a means whereby a Member State could frustrate it.[125]

Formal prerequisites - discrimination in fact. The imposition of formal prerequisites on the exercise of a self-employed activity that apply irrespective of nationality will not normally be discriminatory, at least with respect to establishment.[126] If, in order to engage in their respective activities, a German insurance agent must obtain a permit from his national authorities or a French doctor must join the French medical association, a non-national can legitimately be expected to do the same. There will, however, usually be discrimination in fact where compliance with such requirements is based on foreign residence prior to taking up the activity or whilst engaging in it, for it is difficult to justify the use of this criterion.[127] Moreover, where the granting of a permit or enrolment in a professional organisation are discretionary or entail costs or delay, there will be discrimination in law if the host state either exercises its discretion to deny an equal opportunity to non-nationals or subjects them to greater costs or delay.

Formal prerequisites and the non-national provider. A non-national provider of services may have to perform his services at very short notice or forgo the opportunity to do so, as in the example given earlier of the British surgeon wishing to perform an operation in France. As a result any formal prerequisite that takes time to meet can operate as a measure equivalent to a direct prohibition, whether it applies irrespective of nationality or not.

The secondary legislation of the Council offers no comprehensive solution to this problem, and on most occasions the non-national provider is treated in the same way as a person wishing to establish himself in another Member State. With respect to Community formalities, only the health care directives take cognizance of the difficulties that a provider may encounter by allowing him, in cases of urgency, to file the declaration that he is providing services in the host state subsequent to their provision,[128] and by exempting him from the obligation to prove good character and health.[129] But there is no similar concession as regards proof of qualifications and of establishment in another Member State, which can also be required by the host state before the services may be provided.[130]

The situation with regard to national formal prerequisites that apply irrespective of nationality is but a little better. This time the health care directives do offer a comprehensive solution for the activities they regulate by exempting the provider from the need to obtain any authorisation,[131] and by either dispensing him from membership of the host state's professional organisation or providing for automatic membership that "does not delay or in any way complicate the provision of services...."[132] Directive 77/249 on the provision of legal services and Directive 65/1 on the provision of agricultural services also exempt the provider from membership of the respective professional or trade association, although the exemption only lasts for ninety days in the latter case.[133] All the other directives treat providers on an equal footing with non-nationals who establish themselves in another Member State. Directive 71/18, for example, accords all non-national self-employed persons the right to join the host state's professional or trade association "under the same conditions and with the same rights and obligations as...nationals,"[134] which may help little if the provider has to wait a month or so in order to be accepted as a member.

The unsatisfactory state of the secondary legislation means that the non-national provider will have to turn to the Treaty and the Court of Justice for relief. In the case of Community formalities that regulate access to rights accorded directly by the Treaty, such as proof of an establishment in another Member State,[135] the Court has consistently taken the view that they must not prejudice the exercise of these rights.[136] Applying this judicial attitude to the right to provide services, it means that, where it is not possible for a provider to complete the formalities prior to the provision of the services, he must be allowed to do so afterwards. In other words, if a Member State wishes to make sure that only persons coming within the scope of the Treaty enjoy its protection, it must so operate the necessary formalities that they do not delay or obstruct the provision of services by non-nationals; otherwise, it will have to rely on control after the fact. Where the health care directives provide in any case for such control after the fact,[137] this provision will presumably always govern, as it is the most advantageous to the non-national provider.

The same approach cannot, however, be applied to national formalities that arise from the adoption by a Member State of a Community harmonising scheme, for the rights created by such schemes derive from the legislation of the Council and not from the Treaty.[138] Consequently, a non-national can only avail himself of the mechanisms provided by Community harmonising legislation by submitting to the formalities that they entail, even where this causes a fatal delay. For example, a non-national provider wishing to avail himself of the directives on mutual recognition of qualifications must follow the procedure for having his domestic diploma evaluated and eventually accepted;[139] he cannot by-pass the rules by appealing to the Treaty, as the Treaty does not give him a right to recognition of his domestic qualifications except in the event of recognized equivalence.[140] Nevertheless, there must be some room for judicial control of such formalities as, otherwise, they can easily lead to abuse. It is suggested, therefore, that the harmonising legislation could well be construed by the Court as implicitly requiring the national formalities that derive from it to be completed without undue delay.[141] This will not always be sufficient for non-national provider, but it is difficult to see how the Court could go further.

The Court's attitude towards the application to non-national providers of national formal prerequisites that apply irrespective of nationality is much clearer. Because these requirements can often prevent the provision of services due to the delay involved in complying with them, the Court has stated that they should not, as a general rule, be applied to non-national providers established in another Member State.[142] For, as in all cases where general laws place non-nationals at a disadvantage, there will be discrimination in fact unless the laws can be objectively justified. In this particular situation however, the Court not only obliges the host state to show an objective justification but also requires that it demonstrate that the public interest served by the formal prerequisites is not already safeguarded by similar prerequisites in force in the provider's home state:

> Freedom to provide services is one of the fundamental principles of the Treaty and may be restricted only by provisions which are justified by the general good and which are imposed on all persons or undertakings operating in the said State in so far as that interest is not safeguarded by the provisions to which the provider of services is subject in the Member State of his establishment.[143]

Thus, if a host state cannot show that the control that a permit or other authorisation or membership in a trade or professional organisation enables it to exercise over a particular activity is necessary to protect the public welfare, it cannot require a non-national provider to comply with the formality. Nor can it require this, if the non-national provider is so controlled in his home state by virtue of similar formal prerequisites. The only alternative for the host state, which is provided for in some of the health care directives,[144] is to remove the discriminatory element from its formal prerequisites by enabling them to be fulfilled by non-national providers without delay.

Finally, and somewhat paradoxically, it should be noted that where a national formal prerequisite can validly be applied to a provider, it is possible to base its application on the criterion of residence as long as the host state can show that the prerequisite is necessary to ensure compliance with national rules.[145] A Member State could, for example, require only a non-resident provider who is not regulated in his home state to obtain a permit on the basis that only the threat of its withdrawal ensures that the provider will not disregard national rules.

Substantive prerequisites - discrimination in law (permits subject to conditions, membership in a professional or trade association contingent upon passing an examination, qualifications, prior residence, possession of certain personal attributes, deposit or security, and language competence). In addition to the general prohibition on discriminatory treatment of non-nationals,[146] Title IIIA of the general programmes forbids the application to non-nationals alone of certain specific substantive prerequisites, namely the imposition of conditions on the granting of permits or authorisations,[147] prior residence in the host state and possession of its qualifications,[148] and the lodging of a security or a deposit.[149] The directives contain supplementary prohibitions on particular national practices. Directive 64/225 on reinsurance and retrocession, for example, prohibits the use by the German Minister of Economic Affairs of his discretionary power under the German *Versicherungsaufsichtsgesetz* to impose special conditions on the licensing of non-national insurers,[150] while Directives 64/428 on mining and quarrying, 69/82 on prospecting and drilling and 66/162 on public utility undertakings all proscribe the imposition of similar discriminatory conditions on the licensing of the activities that they regulate.[151] Directives 73/239 and 79/267 on direct insurance forbid the requirement of a deposit or security.[152] The directives that contain harmonising rules for enabling non-nationals to prove good repute, sound financial status or physical and mental health, the possession of which attributes constitutes another substantive prerequisite, all make it clear that this proof can only be demanded when it is also required of nationals.[153] Although no mention is made in either the general programmes or the directives of the discriminatory application of the prerequisite of linguistic competence, it would similarly infringe the general principle that substantive prerequisites cannot be required only of non-nationals to demand that non-nationals alone demonstrate such competence.[154] As with the formal prerequisites, companies and firms also benefit from these prohibitions against discrimination in law.[155]

Substantive prerequisites - discrimination in fact. Unlike the situation with formal prerequisites, the imposition of substantive prerequisites irrespective of nationality will more often than not disadvantage not just providers but all non-national self-employed persons, as they require them to have done something that is more easily done by nationals.[156] A national is more likely to be able to demonstrate prior residence in his home state, and he will usually have acquired his qualifications and taken any professional or trade examinations there as well. He will invariably be competent in his own language. It is also probable that his greater familiarity with the business environment of his own country will enable him more readily to meet any conditions that are placed on the granting of permits or authorisations. Such substantive prerequisites will therefore have to be objectively justified if they are to apply to non-nationals too. On the other hand, the possession of personal attributes, such as good repute, sound financial status and physical and mental health, and the lodging of a security or a deposit are not prerequisites that will normally put the non-national at a disadvantage, at least in the case of establishment; he should be just as able as a national to meet them. They will only become discriminatory in fact if they are based on the unjustified use of the criterion of residence.[157]

The question of the objective justification for the requirement that a non-national possess the qualifications of the host state has already been discussed.[158] It was pointed out that this prerequisite is normally justified on the basis of the need to maintain standards and protect the public welfare, but that, where a Member State has recognised the qualifications awarded by another Member State as equivalent to its own, this justification no longer obtains. Such was the case in both Thieffry (71/76) and Patrick (11/77), where the Court of Justice upheld the right of a Belgian lawyer and a British architect, whose qualifications had been recognised by the University of Paris[159] and the French government respectively, to practice in France.[160] The Court characterised the prerequisite of French qualifications under the circumstances as "an unjustified restriction on that freedom"[161] and stated as a general principle that:

> ...a national of...a Member State who holds a qualification recognized by the competent authorities of the Member State of establishment as equivalent to the certificate issued and required in that State enjoys the right to be admitted to the profession...and to practice it under the same conditions as nationals of the Member State of establishment without being required to satisfy any additional conditions.[162]

This same principle should also be applicable to examinations that must be passed in order to become a member of a professional or trade organisation, but there is no instance of the Court of Justice applying it in this way. The directives certainly do not envisage any recognition of similar examinations taken in the non-national's home state and, except for some indulgence shown towards providers,[163] generally expect non-nationals to submit to the same conditions of membership as nationals.[164] Neverthetheless, if a non-national can demonstrate that his domestic professional or trade examinations have been recognized as equivalent to those of the host state, it is suggested that he should be able to rely on the Court's pronouncements in Thieffry (71/76) and Patrick (11/77) in order to claim an exemption from taking the latter.

The principle of recognised equivalence does not, however, appear to be relevant to the question of conditions that are imposed on the granting of licences and authorisations, at least with respect to establishment, for these conditions are not concerned with proof of a certain level of competence but with ensuring that an activity is carried on in a certain way. Consequently, there is no reason for dispensing a non-national established in one Member State from complying with the conditions merely because he was subject to similar conditions in a previous host state, or because his primary establishment is so subject. On the other hand, if a non-national has already met the conditions in question in another Member State, he will normally have no more difficulty than nationals in meeting this particular substantive prerequisite, so that the discriminatory element is eliminated and with it the need for an objective justification.

There remain the prerequisites of prior residence and competence in the language of the host state. The first of these is difficult to justify and is specifically prohibited for some activities by the directives.[165] The second would seem to be perfectly acceptable where the nature of a non-national's activity entails regular communication with nationals of the host state. This is the approach adopted by Regulation 1612/68 with respect to employees,[166] and a similar approach would seem to be in order for self-employed persons. However, the waters are muddied somewhat by a provision common to all the health care directives that places the responsibility for language competence on the host state:[167]

> Member States shall see to it that, where appropriate, the persons concerned acquire, in their own interest and in that of their patients, the linguistic knowledge necessary for the exercise of their profession in the host Member State.

This provision clearly implies that linguistic competence is not an acceptable prerequisite for self-employed non-nationals even where it is required irrespective of nationality. And, considering the sensitive area with which these directives are concerned, one could conclude that this is the general view of the Council towards this particular prerequisite. This apparent discrepancy in the Council's attitude towards employed and self-employed non-nationals may well reflect a belief that the market place will force self-employed persons to acquire the necessary linguistic competence, whereas a paid employee, once hired, might have to be kept on despite his functional uselessness. However, it must be emphasised that it is not up to the Council to interpret the rights of Member States under the Treaty and, although the Court of Justice may be loth to disallow secondary legislation that actually eliminates the prerequisite of linguistic comptetence, it could well uphold the right of a host state to impose it in other areas.

Substantive prerequisites - discrimination in fact and the non-national provider. Unlike formal prerequisites that apply irrespective of nationality,[168] substantive national prerequisites of general application will usually disadvantage both providers and persons establishing themselves in another Member State. The only difference between the effect of these measures on the two groups of non-nationals arises from the delay involved in complying with them, which, because of the short notice at which services may have to be performed, can transform prerequisites into measures equivalent to a direct prohibition. Moreover, the delay caused by the obligation to lodge a deposit or security and to prove good character and other personal attributes means that these prerequisites, which are not discriminatory in the case of establishment,[169] can nevertheless disadvantage non-national providers.

The general principle adopted by the Court of Justice with respect to discrimination in fact is that the national measure that causes the problem may stand if it can be objectively justified.[170] This principle applies equally to non-national providers, for, where a measure is shown to be necessary to protect the public good, this protection will be needed as much in the case of the temporary activities of providers as in that of the permanent establishment of a non-national in the host state.[171] Nor does the Court distinguish between the various categories of restrictions. Whether a national measure of general application takes the form of a direct prohibition on the non-national's right to pursue a livelihood or of a measure having an equivalent effect or merely constitutes a prerequisite to be met before the right can be exercised, it can always be objectively justified.[172] To this extent, therefore, there is no reason for extending any special treatment to providers concerning compliance with substantive national prerequisites beyond requiring an objective justification for the obligations to lodge a security or deposit and to prove personal attributes, which, in the case of providers alone, are a potential source of discrimination in fact because of the delay involved. And, in so far as possession of the host state's qualifications and linguistic competence are concerned, providers are indeed treated in the same way as other non-national self-employed persons.[173]

Some relief has, however, been forthcoming for providers from the Court of Justice on the basis of the principle of proportionality, by virtue of which the Court has held that a national measure cannot stand, despite its objective justification, where the nature of the restriction placed on the right to provide services is excessive in relation to the public interest that it serves. The Court adopted this approach in two cases, van Wesemael (110/78) and Webb (279/80), dealing with the imposition of conditions on the granting of a licence to carry on the business of an employment agency as a service in the host state. In both instances the non-national agency had already been obliged to meet certain conditions in its state of establishment in order to obtain a licence to set up business and was contesting the requirement that it go through the same process in the state where it was providing services. The Court took the view that this requirement could not be upheld where, despite the public interest served by the prerequisite, the non-national provider was already in possession of a licence "issued under conditions comparable to those required by the State in which the service is provided and [where] his activities are subject in the first State [i.e. that of establishment] to proper supervision covering all employment agency activity whatever may be the member-State in which the service is provided."[174] In other words, it is a disproportionate interference with the right to provide services when a restriction is placed on it in the name of a public interest that is already adequately safeguarded. As has been seen, the Court adopts a similar approach towards the validity of national formal prerequisites that apply irrespective of nationality to providers.[175]

The final disposition of the Webb case (279/80) is interesting. The conditions that had to be met by the British agency wishing to provide manpower to the Dutch labour market were inspired by the Dutch government's concern for good industrial relations and respect for the interests of the work-force. In its submission to the Court of Justice the Dutch authorities maintained that these were not the criteria that governed the granting of the licence in the United Kingdom and that, consequently, the prerequisite did not represent an unnecessary duplication. While leaving the final decision on the facts to the relevant Dutch court, the Court nevertheless indicated that the Dutch argument was well-founded.[176]

> It follows in particular that it is permissible for Member States, and amounts for them to a legitimate choice of policy pursued in the public interest, to subject the provision of manpower within their borders to a system of licensing in order to be able to refuse licenses where there is reason to fear that such activities may harm good relations on the labour market or that the interests of the workforce affected are not adequately safeguarded. In view of the differences between one Member State and another, on the one hand, and the diversity of the criteria which may be applied with regard to the pursuit of activities of that nature on the other hand, the Member State in which the services are to be supplied has unquestionably the right to require possession of a licence on the same conditions as in the case of its own nationals.

It would seem that the principle of proportionality could also be applied to the obligations to lodge a security or deposit and to prove good character, sound financial status and other personal attributes, where the non-national provider has already met the prerequisite in his state of establishment. In the case of the security and deposit, there is surely no need for them if the state of establishment is prepared to hold them forfeit on account of misdoings in another Member State connected with the provision of services. As far as personal attributes are concerned, such qualities are indivisible; if a person has proved that he possesses them in his state of establishment, there is no reason to believe that he will lose them by carrying out services in another state. However, neither the Court nor the secondary legislation have provided special arrangements with respect to securities and deposits, and only the health care directives on mutual recognition of qualifications exempt the non-national provider from having to prove good character and physical and mental health.[177] But this does not mean that all is lost, as the Court has not ever ruled definitively on the matter.

As has been mentioned above, the same rules are applied with respect to qualifications to providers and other non-nationals alike. This is a logical approach, for there is no room here for special treatment for providers on the basis of proportionality; the very premise for the host state's requirement of its own qualifications is that the possible inferior quality of a non-national's domestic qualifications means that possession of the latter does not adequately safeguard the public interest. Thus, it is only in the case of recognized equivalence that the prerequisite cannot stand. Nevertheless, those directives that exempt non-national providers from the obligation to join a professional or trade association do not distinguish between membership as a formality and membership that is contingent upon the passing of an examination.[178] The clear implication, therefore, is that the exemption also applies to the need to take and pass the appropriate professional or trade examination. This is surprising, as such examinations fall into the same category as qualifications; either the non-national's domestic examinations are of an equivalent standard to those required in the host state, in which case the exemption should apply also to persons establishing themselves, or they are not so equivalent, in which case it is difficult to see any basis for the exemption for providers. It is, however, relatively easy to see the reason for the differentiation. Whereas as a person wishing to establish himself in another Member State will only be inconvenienced by having to re-take an examination, the provider of services will be thwarted completely if the business opportunity passes before membership in the appropriate association is achieved. But to premise special treatment for providers on the fact that a prerequisite becomes for them a measure having equivalent effect to a direct prohibition is to imply that the validity of an objective justification for a national measure of general application varies according to the nature of the restriction that it entails. And while it is true that the Court of Justice does, on occasion, establish a correlation between the seriousness of a restriction and the purpose it serves,[179] it would seem inappropriate to apply different considerations to providers where the same public interest is at stake and there are no other means available to safeguard it. However, it is unlikely that the Court of Justice will rule such directives to be ultra vires the Treaty, as there are few instances of the Court opposing even an unjustified extension of the freedoms guaranteed by the Treaty.

Finally, there is the question of residence. The substitution of this criterion for that of nationality is not generally acceptable, but, in the case of providers, it can sometimes be justified by the need to ensure compliance with national rules.[180] A host state could conceivably use this need as a basis for imposing additional conditions on the granting of a licence to non-resident providers or for requiring from them alone the lodging of a security or a deposit, provided always that there is not sufficient control exercised by their state of establishment. None of the other substantive prerequisites, on the other hand, can have much to do with the enforcement of national rules. For example, it would be difficult to sustain the argument that linguistic competence would incline the non-resident provider towards their observance. Nor can prior residence be so justified either, so that this particular prerequisite will be as inapplicable to providers as it is to persons wishing to establish themselves. In both cases an objective justification is possible but unlikely.

The Subjection of the Exercise of the Right to Exceptionally Onerous Conditions

Introduction. The first paragraph of Title IIIA of the general programmes requires the elimination of "[a]ny measure which prohibits or hinders nationals of other Member States in their pursuit of an activity...."[181] Among the measures that can hinder the right to pursue self-employed activity in another Member State is the imposition by that state of conditions that make it more difficult for a non-national to exercise the right than a national. Such conditions normally only infringe the non-national's right to equal treatment, but, where the difficulties for the non-national are such that it is no longer worth his while to pursue the activity in question, the right to pursue a livelihood itself is thwarted.

There is a difference between measures that are equivalent to a direct prohibition on the non-national's right to pursue a livelihood and those that, although theoretically leaving the right intact, make its exercise a practical impossibility. For example, whereas the exclusion of non-national doctors from compulsory membership in a professional organisation will prevent them from practising in the host state, a similar exclusion from the social security register will have the more limited effect of making them dependent for their livelihood on private patients; and such a limitation may well render the pursuit of their profession no longer economically feasible without absolutely preventing it.

Discrimination in law. The imposition of exceptionally onerous conditions exclusively on non-nationals is prohibited generally by the first paragraph of Title IIIA of the general programmes. Specific examples of such conditions are given in the second paragraph. These concern the imposition of excessive fiscal and other financial burdens on non-nationals,[182] limiting their access to sources of supply and distribution[183] and to vocational training,[184] restrictions on the rights of non-national shareholders, directors and company agents,[185] encroachments on the right to participate in social security schemes,[186] and less favourable treatment for non-nationals in the event of nationalisation, expropriation or requisition.[187] As far as social security is concerned, exclusion from benefits should not affect the self-employed as badly as paid employees, for the former are normally more able and accustomed to providing for themselves.[188] On the other side of the fence, however, the protection afforded by the Treaty, as interpreted by the general programmes, will be relevant for non-national medical practitioners who need to be able to treat patients under the social security system of the host state. In the case of less favourable treatment for non-national victims of nationalisation and the like, existing legislation would have the effect of deterring the non-national from setting up in the first place, while the introduction of such a measure after his establishment might well cause him to leave before it enters into force. In either case there is an infringement of the right to pursue a livelihood.

Certain other matters that are mentioned in Title III of the general programmes, such as the lack of power to exercise necessary ancillary rights and prohibitions on the movement of items to be supplied or used during the provision of services and on the transfer of monies to perform or pay for services, have already been discussed as measures equivalent to a direct prohibition on the right to pursue a livelihood.[189] Where, however, these acts are not prohibited but hindered by onerous conditions attached to their performance, the right may become too difficult rather than impossible to exercise. The same is true when restrictions on the receipt of the services of non-nationals give way to discentives against receiving them, such as a special tax payable by the domestic recipient or the removal of certain remedies against the non-national provider.[190]

As with the other restrictions, the directives incorporate the prohibitions of Title III as well as singling out for elimination certain specific national practices. Directive 64/225 on reinsurance and retrocession, for example, prohibits the use of the power given the German Minister for Economic Affairs under the Versicherungsaufsichtsgesetz to set out conditions under which a non-national insurer must operate.[191] Likewise, Directive 65/530 on the acquisition of agricultural land proscribes the use of a Belgian law that gives the national authorities the power to require that pursuit of agricultural activities by non-nationals be carried on in a particular place.[192] Depending on the terms and the place, respectively, these provisions could render worthless the right to pursue the activity in question.

Restrictions on the use of non-E.E.C. personnel by non-nationals also fall into the category of conditions that can prejudice the right to pursue a livelihood. Clearly, when a non-national has come to rely absolutely on the services of such personnel, he may well have to abandon the idea of doing business in a state that prohibits their use. Accordingly, Title IIIA of the General Programme on establishment, in fulfilment of Article 54(3)(f) of the Treaty, proscribes measures that prevent the free transfer of non-E.E.C. personnel on two conditions.[193] The first condition is that the persons concerned be either managerial or supervisory personnel, and the second condition limits their free transfer to a secondment from the primary to a secondary establishment. These two conditions are reasonable, for they issue from the premise that the inability to use non-E.E.C. personnel can only affect the right to pursue a livelihood where they have become indispensable; and such indispensability can only arise where they already hold important positions in an existing establishment. No mention of the use of non-E.E.C. personnel is to be found in Title III of the General Programme on services, but the same principles must apply. Their employment must be permitted under similar conditions if the services cannot otherwise be effectively performed. Recognition of this fact appears in Title II of the General Programme on services, which provides for the entry of staff "possessing special skills or holding positions of responsibility accompanying the person providing the services or carrying out the services on his behalf."[194]

Discrimination in fact. Onerous conditions that make it practically impossible to engage in an activity will rarely be imposed irrespective of nationality. Otherwise, it would be pointless to permit the activity in the first place. There are, however, three exceptions to this general premise.

The first exception concerns activities that are tolerated with reluctance by a Member State, which consequently places as many obstacles as possible in the way of their pursuit. Where this is the case, the non-national cannot expect to be shown special indulgence. An example of this type of activity are time bargains on the stock exchange, which are frowned upon in Germany as a form of gambling. In Koestler (15/78) a French financial institution provided such a service for a German national and sought to recover its remuneration through legal action in the Federal Republic. The action was dismissed because of the nature of the contract of service. The plaintiff appealed and the matter was referred to the Court of Justice, which held that there is no discrimination involved where both nationals and non-nationals are subject to the same constraints.[195]

The second exception concerns conditions to which nationals have adapted themselves over the years but which greatly disadvantage non-nationals, who are not so accustomed to them. A general restriction on the use of non-E.E.C. personnel, for example, will not affect nationals, who will have become used to doing without their services, but it will affect non-nationals, who, by reason of the more lenient legislation in their home country, have had the opportunity to become dependent on such personnel. Another illustration of this exception is the Debauve case (52/79), where the issue was a Belgian law that prohibited advertising on cable television. The law did not affect Belgian companies who had adapted their business practices to deal with the prohibition, but it seriously jeopardized non-national cable stations. Where there is this disparity between the effect on nationals and non-nationals, the national measure will have to be objectively justified. In Debauve, however, this was not the case, as the Court of Justice held that the regulation of cable television is outside the scope of the Treaty. By contrast, restrictions on the use of non-E.E.C. personnel may be absolutely forbidden by the Treaty.[196]

The third exception comprises those conditions whose imposition can only disadvantage non-nationals even if they are imposed irrespective of nationality. A prime example is restrictions on the international transfer of monies. Such conditions will also have to be objectively justified, but this is not possible for money transfers, which are liberalised by Directive 63/240. One particular national measure that falls within this exception is the requirement existing in some Member States that all doctors and dentists, regardless of nationality, complete a six-month training programme in order to become eligible for appointment under the social security scheme of the state in question. Failure to take such a course will deprive the non-national practitioner of the opportunity to treat patients covered by the scheme, which could well render his right to practice quite worthless. Consequently his only means of avoiding the imposition of such an onerous condition is to interrupt his practice in order to undergo special training that most nationals - that is, all except the very few who envisaged a private practice from the outset of their careers- will have completed along with their other training. The training requirement can therefore be regarded as equivalent to an onerous condition in the sense that it is the only means of avoiding its imposition. Yet, despite the obvious disadvantage to which it puts non-nationals, the requirement is explicitly approved by the directives on the mutual recognition of doctors' and dentists' qualifications for a period of five years following their implementation.[197] This would seem to be a little too bold, for surely a doctor or dentist who can show similar training of recognized equivalence in his home state could rely on the Thieffry (71/76) and Patrick (11/77) principle in order to claim an exemption. The Council does not have the authority to impose a disadvantage on non-nationals where it cannot be objectively justified.[198]

One other interesting aspect of the training requirement is that it applies to providers as well,[199] even though it will be considerably more unlikely that a person who is currently engaged in a practice in one Member State will be able to take off six months in order to train for the eventuality of providing services in another Member State. This uniformity of application contrasts sharply with the indulgence shown towards non-national providers with respect to professional examinations. However, where no training is required in order to practice under a social security scheme, the health care directives recognize that the delay involved in compulsory registration with the scheme could have the effect of unnecessarily confining non-national providers to private patients. Consequently they forestall the imposition of such an onerous condition by exempting these persons from the need to register.[200]

Theoretically, onerous conditions can be imposed on the exercise of a non-national's right to pursue a livelihood by basing their application on the criterion of residence instead of nationality. But this criterion is difficult to justify, and, even in the case of non-resident providers, the Court of Justice would be unlikely to accept it. The argument that national rules can only be enforced against non-resident providers by rendering their activities a practical impossibility surely cannot be sustained.

FOOTNOTES

Chapter 3B

[1] In particular Article 48(3) of the Treaty with respect to entry and residence, and Articles 6(3) and 8(1)(a) of Directive 68/360 with respect to residence - *see*, also, the discussion of this problem in Chapter 2A, pp. 73-75, Chapter 2B, p. 108 and Chapter 3D, p. 283.

[2] Article 52, para. 2.

[3] Article 52, para. 1. For a comment on the term "primary establishment," *see* Chapter 2C, fn. 13.

[4] Article 59, para. 1.

[5] Article 60, para. 3.

[6] Co. Dirs. 65/1, art. 3(2) and 67/654, art. 4(2). This wording is a very accurate paraphrase of the meaning of Article 60, para. 3.

[7] Co. Dirs. 65/1, art. 3(1) and 67/654, art. 4(1).

[8] *See* Chapter 2A, p. 76.

[9] *See*, Chapter 3A, pp. 183-184.

[10] Title IIIA, para. 1.

[11] *See* Title IIIA, para. 2(a) and (d), which go to the right to pursue a livelihood, whereas Title IIIA, para. 2(f) and (j) - (f) and (h) in the General Programme on services - go to the right to equal treatment.

[12] Articles 48, 52, 59, and 60.

[13] The specific provisions of the secondary legislation are discussed *infra*, pp. 200ff.

[14] *See* the discussion of similar formalities in the areas of entry and residence in Chapter 2A, pp. 68-69 and Chapter 2B, pp. 99-100.

[15] *See* Co. Dir. 63/607, arts. 3, 4 and 5 on proof of the E.E.C. nationality of a cinematic film; Co. Dir. 68/367, art. 6 on proof of good repute and no previous bankruptcy by a non-national; and Co. Dir. 75/362, art. 16(3), which permits a Member State to require that a non-national doctor providing services in its territory prove he "is lawfully pursuing his activities in another Member State where he is established," and "holds one or other of the diplomas, certificates or other evidence of formal qualifications appropriate for the provision of the services in question."

For what constitutes valid national laws of general application, *see* Chapter 1, p. 3 and pp. 22-23 and the discussion, *infra*, pp. 195-197.

[16] See the discussion of the use of such national formalities with respect to entry and residence in Chapter 2A, pp. 69-70 and Chapter 2B, pp. 100-101.

[17] See Article 3(1) of Regulation 1612/68, which prohibits only the subjection of the Community right to national requirements. See, too, with respect to self-employed activities, Co. Dirs. 64/223, art. 3(2), 64/224, art. 5(2), 67/654, art. 3(2), 70/451, art. 5(2) and 74/557, art. 4(2), all of which provisions single out the restrictions arising from national formalities rather than the formalities themselves, for elimination.

[18] Emphasis added.

[19] See the discussion in Chapter 1, pp. 31-32.

[20] See Ugliola (15/69). This case is discussed, infra, p. 197. Strangely enough, the Council has interpreted Article 48(2) restrictively in Article 1(1) of Regulation 1612/68 by narrowing down its wider possibilities to the ambit of mere national treatment, but the regulation then joins with Title III of the general programmes in specifically prohibiting measures that discriminate in fact against non-nationals - Article 3(1), 2nd indent. This is an unnecessarily circuitous approach.

[21] P.J.G. Kapteyn and P. Verloren van Themaat, Introduction to the Law of the European Communities (London: Sweet and Maxwell, 1973) at p. 61 make this point with respect to such laws:

"[M]any people still appear to hold the mistaken view...that discrimination is also involved when the unequal treatment of the nationals of the different Member States is due to a difference between the laws of the Member States. This is a misconception because the discrimination concept of the Treaty [of Rome] applies only if the unequal treatment can be imputed to one legal subject (the state, one of its organs, or an enterprise, or a group of enterprises). A national of the Netherlands or the United Kingdom, therefore, cannot object to the high income tax he has to pay by arguing that this income tax exceeds the income tax which the nationals of other Member States are required to pay in their country. In the terminology of the Treaty this type of inequality of treatment on grounds of nationality, which is due to differences between the laws of the Member States, can at best only amount to a 'distortion'."

The point is well taken, although it is better illustrated by the example of a German national complaining about the high tax that he must pay in the Netherlands. Domestic nationals can only use the Treaty where they have severed their connection with their home state - see Chapter 1, pp. 32-34.

[22] In its judgment in Wilhelm (14/68) the Court of Justice declared at [1969] C.M.L.R. 121 that "Article 7 [of the Treaty] does not aim at the disparities of treatment resulting from the differences between the laws of the Member States so long as the latter affect all persons coming within their application according to objective criteria and without regard to nationality" (emphasis added).

[23] Webb (279/80). This case is discussed, infra, pp. 226-227.

[24] Auer (136/78). This case is discussed in Chapter 1, pp.32-34.

[25] See Thieffry, 71/76, [1977] 2 C.M.L.R. 373 at 405; Patrick, 11/77, [1977] 2 C.M.L.R. 523 at 531 and Webb, [1981] E.C.R. 3305 at 3325. With respect to qualifications, it does not matter in which language they were obtained. See infra, p. 205 and pp. 223-224 for a discussion of language prerequisites.

[26] [1976] 1 C.M.L.R. 30 at 39.

[27] Choquet, 16/78, [1979] 1 C.M.L.R. 535 at 549. This matter is now regulated by Directive 80/1263 - see Chapter 4B, pp. 350-351.

[28] A similar test is suggested by Andrew Durand, "European Citizenship," (1979), 4 European Law Review, 1 at 13.

[29] [1970] C.M.L.R. 194 at 199.

[30] [1970] C.M.L.R. 194 at 202.

[31] Ireland (61/77).

[32] Article 57.

[33] Title V of the General Programme on establishment; Title VI of the General Programme on services.

[34] [1975] 1 C.M.L.R. 320 at 333.

[35] [1976] 2 C.M.L.R. 578 at 587.

[36] [1975] 1 C.M.L.R. 320 at 333.

[37] See P. Leleux, "Recent Decisions of the Court of Justice in the Field of Free Movement of Persons and Free Supply of Services," European Law and the Individual, ed. F.G. Jacobs (Amsterdam/New York/Oxford: North-Holland Publishing Company, 1976), p. 82.

[38] See Hans Smit and Peter Herzog, The Law of the European Economic Community (New York: Matthew Bender, 1976-1982), II, p. 2-471.

[39] [1975] 1 C.M.L.R. 320 at 333.

[40] See the discussion in Chapter 1, pp. 19-21 and the Italy case (159/78), which is mentioned, infra, p. 201.

[41] Article 1(1).

[42] These provisions are dealt with in the discussion that follows.

[43] It reads:

"Any national of a Member State, shall...have the right to take up an activity as an employed person, and to pursue such activity within the territory of another Member State...."

[44] Subparagraph (a).

[45] Subparagraph (b).

[46] Article 2.

[47] Article 6(1).

[48] Article 6(2).

[49] Article 8(1).

[50] The right to join such organisations figures prominently in the secondary legislation on self-employed activities, some of which apply to employees as well - _see_ Co. Dirs. 75/362, art. 16 (as amended), 78/686, art. 15, 78/1026, art. 12.

[51] It is also guaranteed directly by the Treaty.

[52] 1st indent.

[53] This provision may apply to individual employers as well - _see_ the discussion, _supra_, pp. 198-200 on the application of the whole regulation to private employers.

[54] The criteria that must be met in order to enjoy the right to employment guaranteed by the Treaty are discussed in Chapter 3D.

[55] _See_ Co. Dir. 82/489, art. 2 on proof by a non-national that he possesses the necessary experience; and Co. Dirs. 75/362, art. 16, 77/452, art. 11, 78/686, art. 15, Co. Dir. 78/1026, art. 12 and 80/154, art. 13 on the proof by providers of services that they are established in another Member State and possess the necessary qualifications. _See_ also the discussion, _supra_, p. 194.

[56] The right of access to the host state's social security scheme is mentioned in the General Programme on establishment. This is odd, as one would think that this is a matter of more concern to employed persons.

[57] _See_ fn. 51.

[58] _See_ _Ugliola_, 15/69, [1970] C.M.L.R. 194 at 202.

[59] The 2nd indent proscribes laws of general application where their aim or effect is primarily or exclusively to discriminate against non-nationals.

[60] Strictly speaking, this requirement of residence thus becomes a prerequisite for employment or acceptable conditions of work. It is to be

distinguished from the prerequisite of prior residence, which requires residence not only at the time of application or hiring but for a preceeding period of time as well.

[61] With regard to access to employment, Article 1(1) of Regulation 1612/68 prohibits the criterion of residence absolutely by guaranteeing the non-national the right to take up employment in another Member State regardless of his place of residence. In Sotgiu (152/73) the Court of Justice accepted that discriminatory conditions of employment based on where the worker was hired can be objectively justified, but this case was not dealing with such onerous conditions of employment for non-residents that the right to work itself was affected.

[62] See Thieffry, 71/76, [1977] 2 C.M.L.R. 373 at 403 and the discussion supra, pp. 195-196.

[63] See Thieffry, 71/76, [1977] 2 C.M.L.R. 373 at 404, Patrick, 11/77, [1977] 2 C.M.L.R. 523 at 531 and the discussion, supra, p. 196.

[64] See Directives 77/02, 75/368, 75/369 and 74/556 with respect to transitional measures; Directives 75/362, 77/452, 78/1026 and 80/154 with respect to mutual recognition of qualifications.

[65] See, infra, pp. 222-223.

[66] See the discussion in Chapter 1, pp. 19-26.

[67] See the discussion in Chapter 1, p. 31.

[68] See the discussion in Chapter 1, p. 24-25.

[69] See the discussion in Chapter 1, p. 25.

[70] See the discussion in Chapter 1, pp. 22-23.

[71] Title IIIA, para. 1.

[72] Title IIIA, paras. 2, 3 and 4 of the General Programme on establishment; Title IIIA paras. 2 and 3 and Title IIIB, C and D of the General Programme on services.

[73] Most directives do - see the summary in the Appendix.

[74] These will be mentioned in the following discussion.

[75] See Co. Reg. 1612/68, art. 3(2)(b).

[76] Discrimination in fact is prohibited by Title IIIB of the General Programme on establishment and Title IIIA, para. 4 of the General Programme on services, as well as by Articles 52 and 60 of the Treaty as interpreted by the Court of Justice - see Chapter 1, pp. 31-32.

[77] Title IIIA, para. 1.

[78] Title IIIA, para. 2(a).

[79] See the summary of the directives in the Appendix for further examples.

[80] Co. Dir. 64/224, art. 5(2)(c).

[81] Co. Dir. 67/43, art. 5(2)(c).

[82] Co. Dir. 63/607, arts. 5, 7.

[83] [1977] 2 C.M.L.R. 478 at 507.

[84] [1975] 1 C.M.L.R. 298 at 312-313.

[85] [1975] 1 C.M.L.R. 298 at 315.

[86] [1976] 1 C.M.L.R. 30 at 38-39.

[87] [1976] 2 C.M.L.R. 433 at 436.

[88] Article 4(1).

[89] Title IIIA, para. 3.

[90] Title IIIA, para. 3(a).

[91] Title IIIA, para. 3(b).

[92] Title IIIA, para. 3(c).

[93] Title IIIA, para. 3(d) and (e).

[94] Title IIIA, para. 3(f) and (g).

[95] Title IIIA, para. 3(h).

[96] Title IIIA, para. 3(i).

[97] See the discussion, infra, pp. 217-218 and pp. 228-229.

[98] Co. Dirs. 77/452, art. 11(1) and 80/154, art. 13(1) exempt the non-national provider from membership, while Co. Dirs. 75/362, art. 16(1) (as amended by Directive 82/76), 78/686, art. 15(1), and 78/1026, art. 12(1) stipulate either an exemption or automatic membership. Co. Dir. 65/1, art. 4(1) provides for an exemption for ninety days, but, if the services last longer than that, the non-national must join the appropriate organization on the same terms as nationals.

[99] See Co. Dirs. 73/183, art. 4, 70/451, art. 5, 68/365, art. 4, 67/654, art. 4, 68/367, art. 4, and 64/429, art. 5.

[100] Ibid.

[101] *See* the summary of the directives in the Appendix for other examples.

[102] Article 4(2)(d) and (e), as amended by the Act of Accession.

[103] Co. Dirs. 69/82, art. 3(1)(c) and 66/162, art. 4(1)(c).

[104] Title IIIA, para. 2(h).

[105] Title III, para. 1 and Title III B, C and D.

[106] *Van Binsbergen* (33/74) - *see*, *supra*, pp. 208-209.

[107] [1976] 1 C.M.L.R. 30 at 38-39. In this case there were less stringent measures available - *see*, *supra*, p. 210.

[108] Article 1.

[109] Title IIIA, para. 1.

[110] Title IIIA, para. 2(b), which prohibits the use of permits and authorisations. Another formal prerequisite is membership in a trade or professional organisation that is not contingent upon the passing of an examination, but this requirement is not mentioned in either the general programmes or the directives as it is inconceivable that it would be applied only to non-nationals.

[111] *See* the summary of the directives in the Appendix. There are a few exceptions - e.g. Directive 63/697 on the film industry.

[112] *See* Co. Dirs. 63/223, art. 3(2)(c); 64/224, art. 5(2)(c); 64/225, art. 3(a); 68/367, art. 3(2)(c).

[113] *See* Co. Dirs. 64/223, art. 3(2)(e); 64/224, art. 5(2)(f); 64/225, art. 3(a); 68/367, art. 3(2)(f).

[114] *See* Co. Dir. 68/363, art. 5(2)(d).

[115] See fnn. 112 to 114.

[116] Article 58 of the Treaty. *See*, also, Title I of the general programmes and the discussion in Chapter 3D, pp. 281-282.

[117] 3rd recital to the Preamble of Directive 64/225. *See*, also, the Preamble to Directives 64/428, 64/429 and 66/162.

[118] See the discussion on the source of the right to corporate recognition in Chapter 2C, pp. 121-124.

[119] Smit and Herzog, op. cit. at II, p.2-573 and Derrick Wyatt and Alan Dashwood, *The Substantive Law of the EEC* (London: Sweet and Maxwell, 1980), at p. 187 suggest that the prohibition on national formalities is absolute, but this would conflict with the Court of Justice's view that Member States have a right to impose formalities for purposes other than that

of controlling the exercise of a Treaty right - see Chapter 2A, pp. 69-70. and Chapter 2B, p. 100-101. It should also be noted that Title IIIA, para. 2(b) of the general programmes only prohibits permits and authorisations where the pursuit of an activity is made subject to their issuance, and that the directives only mention the need to abolish the restrictions arising out of national formalities - see fn. 17.

[120] The various harmonisation schemes are discussed in Chapter 3C.

[121] Article 16(2), (3). See, also Co. Dirs. 77/452, art. 11(2), (3); 78/686, art. 15(2), (3); 78/1026, art. 12(2), (3); 80/154, art. 13(2), (3).

[122] Articles 11-13. See, also Co. Dirs. 65/1, art. 6; 68/365, art. 4; 73/183, art. 5; 77/92, art. 10; 78/1026, arts. 6-8. All of these provisions provide mechanisms to enable a non-national to prove variously his good repute, sound financial status and good health. A national will also have to submit similar evidence, but the harmonising mechanisms set up a particular form of proof for non-nationals. To this extent they are technically discriminatory, although they exist to make it easier for non-nationals to conform to valid national rules.

[123] Co. Dirs. 75/362, art. 15(1); 77/452, art. 10(1); 78/686, art. 13(1); 78/1026, art. 10(1); 80/154, art. 11(1).

[124] The question of time limits for providers of services is discussed, infra, pp. 217-218.

[125] Certainly in the case of formalities that regulate rights deriving from the Treaty the Court of Justice does not permit them to prejudice the enjoyment of these rights - see Chapter 2A, p. 70. Although rights deriving from Community harmonisation legislation are governed solely by this legislation, the Court could surely find an implicit obligation on the Member States to complete all formalities within three months.

[126] The position of providers with respect to such prerequisites is discussed, infra, pp. 216-220.

[127] See the discussion of the use of this criterion with respect to direct prohibitions, supra, p. 209.

[128] Co. Dirs. 75/362, art. 16(2); 77/452, arts. 11(2); 78/686, art. 15(2); 78/1026, art. 12(2); 80/154, art. 13(2).

[129] In all the health care directives the harmonising rules relating to proof of good character and health occur only in the section that deals exclusively with establishment. As there is no good reason for depriving the provider of these facilitating measures, it must be assumed that they are exempt from the requirement altogether.

[130] Co. Dirs. 75/362, art. 16(3); 77/452, art. 11(3); 78/686, art. 15(3); 78/1026, art. 12(3); 80/154, art. 13(3).

[131] Co. Dirs. 75/362, art. 16(1); 77/452, art. 11(1); 78/686, art. 15(1); 78/1026, art. 12(1); 80/154, art. 13(1).

[132] Ibid. Directives 77/452 and 80/154 only provide for exemption from membership.

[133] Co. Dirs. 77/249, art. 4(1); 65/1, art. 4(1).

[134] Article 5(1). A perusal of the summary of directives in the Appendix will confirm the widespread use of this formula.

[135] Under Article 59 only persons established in another Member State are given the right to provide services in a host state.

[136] *See* Chapter 2A, p. 70.

[137] As in the case of the declaration that services are being provided in the host state - *see* Co. Dirs. 75/362, art. 16(2); 77/452, art. 11(2); 78/686, art. 15(2); 78/1026, art. 12(2); 80/154, art. 13(2).

[138] See the discussion of the relationship between the Treaty and the Council's harmonising legislation in Chapter 1, pp. 22-23.

[139] *See*, for example, Article 22 of Directive 75/362, which provides that a host state may even seek confirmation of the authenticity of diplomas submitted by non-nationals. The other health care directives contain a similar provision.

[140] *See* the discussion on recognized equivalence, *infra*, p. 222.

[141] *See* fn. 125 with respect to a similar implied time limit for establishment.

The health care directives dispense providers from the need to comply with the harmonising rules on proof of good character and health - *see* fn. 129 - but this approach is not possible on a general basis. The harmonising rules relate exclusively to substantive national prerequisites, most notably the need for the host state's qualifications, nearly all of which can be validly applied to providers - *see* the discussion, *infra*, p. 225.

[142] *Webb*, 279/80, [1981] E.C.R. 3305 at 3324.

[143] *Webb*, 279/80 [1981] E.C.R. 3305 at 3325. If the public interest is so safeguarded, a duplication of control by the host state would represent a disproportionate restriction on the freedom to provide services.

[144] *See* the provision for automatic and immediate membership of the host state's appropriate medical association in Co. Dirs. 75/362, art. 16(1) (as amended by Directive 82/76); 78/686, art. 15(1); 78/1026, art. 12(1).

[145] *See* the discussion on the use of the criterion of residence with respect to providers, *supra*, p. 208-210 and p. 212.

[146] Title IIIA, para. 1.

[147] Title IIIA, para. 2(c).

[148] Title IIIA, para. 2(d).

[149] Title IIIA, para. 2(e).

[150] Article 3(a).

[151] Articles 4(1)(c), 3(1)(c) and 4(1)(c) respectively.

[152] Article 6(2) in both cases.

[153] See Co. Dirs. 65/1, art. 6; 68/365, art. 6; 68/369, art. 4; 73/183, art. 5; 75/362, arts. 11-13; 77/92, art. 10; 78/1-26, arts. 6-8.

[154] See Co. Reg. 1612/68, art. 3(1), last sentence, where the requirement of linguistic competence for employees is permitted only where it applies to nationals as well.

[155] See, supra, p. 214.

[156] The provider still cannot be treated in exactly the same way as other non-nationals, however - see the discussion, infra, pp. 224-230.

[157] The use of this criterion with respect to any of the substantive prerequisites can rarely be justified in the case of establishment.

[158] See Chapter 1, p. 4 and pp. 22-23 and supra, p. 196.

[159] In Thieffry (71/76) there was also an implied acceptance by the French authorities of his Belgian law degree, as he was permitted to use it as a basis for writing and obtaining the French qualifying certificate for the profession of avocat.

[160] In Auer (136/78), by contrast, the non-national's Italian qualifications were substantially inferior to the French qualifications. See the discussion of this rather inconclusive case in Chapter 1, pp. 32-34.

[161] Thieffry, 71/76, [1977] 2 C.M.L.R. 373 at 404.

[162] Patrick, 11/77, [1977] 2 C.M.L.R. 523 at 530.

[163] See the discussion, infra, pp. 228-229.

[164] See fn. 134.

[165] See Co. Dir. 68/367, art. 3(2)(e), which prohibits the Luxembourg requirement that any person wishing to open an inn or tavern in the Grand Duchy must have resided there for five years previously.

[166] Article 3(1), last sentence.

[167] Co. Dirs. 75/362, art. 20(3); 77/452, art. 15(3); 78/686, art. 18(3); 78/1026, art. 14(3); 80/154, art. 16(3).

[168] These prerequisites will not normally disadvantage non-nationals establishing themselves - *see*, *supra*, pp. 215-216.

[169] *See*, *supra*, pp. 221-222.

[170] *See* the discussion of discrimination in fact, *supra*, pp. 195-196.

[171] *See* *van Wesemael*, 110/78, [1979] 3 C.M.L.R. 87 at 105, where the Court of Justice states that "specific requirements imposed on persons providing services cannot be considered incompatible with the Treaty where they have as their purpose the application of professional rules, justified by the general good...." *See*, also *Webb*, 279/80 [1981] E.C.R. 3305 at 3325 and the statement of Advocate-General Warner in *Coenen*, 39/75, [1976] 1 C.M.L.R. 30 at 36 that "the object of Articles 59 and 60 of the Treaty,...is to eliminate discrimination. It is not to eliminate rules that are needed for the protection of the public."

[172] *See* the attitude of the Court of Justice to the requirement of residence in *van Binsbergen* (33/74) and *Coenen* (39/75), where it practically nullifies the right to provide services.

[173] With respect to qualifications, all non-nationals are treated equally in the directives on mutual recognition and in those that set up transitional arrangements to facilitate compliance with this prerequisite. Similarly the directives contain no special arrangements on linguistic competence for providers, who do, however, benefit from the implicit exemption from this prerequisite in the health care directives - see fn. 167. In its statements on the question of recognized equivalence of domestic qualifications, the Court of Justice makes no special allowance for providers - *see* fn. 162.

[174] *Van Wesemael*, 110/78, [1979] 3 C.M.L.R. 87 at 111-112. *See*, also, *Webb*, 279/80, [1981] E.C.R. 3305 at 3325. The same approach cannot be adopted with respect to non-nationals who are established in the host state, as their activities there will not be subject to the control of any other Member State - *see* the discussion of this prerequisite in this context, *supra*, p . 223. There is, however, some provision for the control of the activities of an undertaking by the state of primary establishment in the coordination directives on direct insurance and credit institutions - *see* Chapter 3C, pp. 255-258.

[175] *See*, *supra*, p p. 218-219.

[176] *Webb*, 279/80, [1981] E.C.R. 3305 at 3325.

[177] *See* fn. 129.

[178] *See* Co. Dirs. 65/1, art. 4(1); 75/362, art. 16(1); 77/249, art. 4(10; 77/452, art. 11(1); 78/686, art. 15(1); 78/1026, art. 12(1); 80/154, art. 13(1).

[179] There are, in fact, two ways in which the principle of proportionality has been applied by the Court of Justice. The first of these is to see

whether the public interest served by the restriction is otherwise adequately safeguarded, in which case the restriction cannot stand. This is the approach the Court adopts towards the prerequisite of licences - see, supra, p. 219, p. 225-227. The other way is to see whether, in cases of severe restrictions on Treaty rights, there is not a less stringent measure available to protect the public interest at stake. The Court has used the principle in this fashion with respect to the use of the criterion of residence - see, supra, pp. 209-210 and in particular Coenen, 39/75, [1976] 1 C.M.L.R. 30 at 38-39. Because prerequisites are normally designed to attain a specific purpose, in which regard the requirement of passing a professional or trade examination is no exception, there will rarely be available alternative measures that will attain the same result.

[180] See, supra, p. 209.

[181] Emphasis added. The wording in the General Programme on services is slightly different but has the same import.

[182] Title IIIA, para. 2(e).

[183] Title IIIA, para. 2(f).

[184] Title IIIA, para. 2(g) of the General Programme on establishment. This condition will not affect providers.

[185] Title IIIA, para. 2(h) of the General Programme on establishment. This condition will not affect providers.

[186] Title IIIA, para. 2(i) (2(g) for services).

[187] Title IIIA, para. 2(j) (2(h) for services).

[188] Social security benefits for the self-employed are, however, becoming more common in the Member States, and the Community social security system has been adapted by Regulation 1390/81 to accomodate them.

[189] See, supra, pp. 210-212.

[190] Title III, para. 1 of the General Programme on services declares that a provider shall not be affected indirectly by measures taken against the recipient of services.

[191] Article 3(a).

[192] Article 3(2).

[193] Title IIIA, para. 4. Neither the general programme nor the Treaty provision specifically refer to non-E.E.C. personnel, but there is no need for such provisions for E.E.C. nationals, who have an autonomous right to work under Article 48 and Regulation 1612/68.

[194] This provision must refer to non-E.E.C. personnel, as nationals of the Member States may enter as of right under Article 48 of the Treaty and Directive 68/360. This is, in fact, made clear by the reference in the

Preamble to Directives 64/224, 64/223, 64/428, 64/429, 65/1, 66/162, 67/43, 67/654, 68/363, 68/365, 68/367, 70/522 and 74/557 to "the position of paid employees accompanying a person providing services or acting on his behalf...[being] governed by the provisions laid down in pursuance of Articles 48 and 49 of the Treaty."

The reference to persons accompanying the provider and even providing services in his stead in the above directives is at odds with Title I of the General Programme on services, which sets as a condition that the services be performed personally or by a branch or agency. This requirement can perhaps be justified by the wording of Articles 59 and 60 of the Treaty, but it makes little sense. A company, for example, cannot provide services personally, and there is no logical basis for distinguishing between the provision of services through an agency, which is permitted, and by an employee, which is ostensibly not allowed. Even if the reference is construed as meaning that the contract of services cannot be given to a sub-contractor, it cannot be defended; a subcontractor of E.E.C. nationality has just as much right under the Treaty to provide the services as the original party.

[195] Koestler, 15/78, [1979] 1 C.M.L.R. 89 at 103.

[196] Article 54(3)(f) is probably not directly applicable or directly effective, but it clearly indicates that the free use of non-E.E.C. personnel is a right that flows from Articles 52 and 60.

[197] Co. Dirs. 75/362, art. 21; 78/686, art. 20.

[198] The secondary legislation of the Council must be consistent with the Treaty as interpreted by the Court of Justice - see Chapter 1, pp. 25-26.

[199] The provision appears in that part of Directives 75/362 and 78/686 which applies to both services and establishment.

[200] Co. Dirs. 75/362, art. 17; 77/452, art. 12; 78/686, art. 16; 80/154, art. 14. It is interesting to speculate whether, in default of such a provision, the Court of Justice would require the exemption on the basis of proportionality. After all, it would seem excessive to confine providers to private patients merely because they do not have time to complete a mere formality, and it is probable that there exist less restrictive measures that will ensure the smooth administration of a social security scheme.

Chapter 3C

HARMONISATION

Introduction

Neither the directives nor the Treaty require the elimination of national measures of general application - that is to say, those that apply irrespective of nationality - unless they constitute discrimination in fact. To do this, they must not only put non-nationals at a disadvantage but must also lack any objective justification or infringe the principle of proportionality.[1] The result is that much legislation still remains in force within the Member States of the Community with which it is difficult or even impossible for non-nationals to comply. Such legislation tends to affect self-employed persons more than paid employees, but the latter do not escape totally unscathed. For example, the need to possess the qualifications of the host state or to obtain membership in its professional or trade associations, which are common instances of general laws that disadvantage non-nationals, can apply with equal force to employed persons.

Harmonisation is the provision of a mechanism that enables non-nationals to conform to these general laws on a more or less equal footing with nationals. It does not seek to eliminate the national measure but rather to remove its discriminatory aspect. There are four types of harmonisation: mutual recognition of qualifications, coordination of provisions governing a certain activity, transitional measures where mutual recognition and coordination are not possible, and facilitative measures of an *ad hoc* nature. Unlike the liberalising provisions of the directives, harmonisation continues to be necessary even after the end of the transitional period as it does not flow directly from the Treaty.[2]

Because harmonisation of national rules is often essential for the effective exercise of the right to pursue a livelihood, and because it must come through secondary legislation, the Council is thus able to control in some measure the theoretically unlimited right to pursue a livelihood that flows directly from the Treaty provisions. Nowhere is this more evident than in Directive 77/249, where the right of non-national lawyers is effectively restricted to the provision of certain services by the deliberately narrow scope of the facilitating measures contained therein.[3]

There is little that the Court of Justice or any national court can do to remedy this situation, for, even if the Treaty had given them the requisite authority to provide for harmonisation where necessary, such authority could rarely be exercised. Except in the case of certain facilitative measures such as proof of good repute and the modification of oaths, which could be extended by analogy to other areas for which there are no provisions in the directives, the highly detailed and specific nature of the harmonisation process does not lend itself to judicial improvisation. The only avenue open to the courts is to require the elimination of general laws that lack an objective justification or are disproportionate.[4] In the area of health care, it is possible that even this avenue is cut off by Article 57(3), which lays down the coordination of national rules as a prerequisite for the liberalisation of the activities involved. However, many critics take the view that this limitation only applies during the transitional period.[5] This would seem to be a better assessment of the provision,[6] for it operates only so as to limit the progressive abolition of restrictions pursuant to Articles 54(2) and 63(2)[7] and thus could be said to have no effect on the immediate and total liberalisation brought about by the direct effect of Articles 48, 52 and 60. Five coordination directives have in any case been issued in the health care area, although as yet no similar action has been forthcoming for pharmacists.

Mutual Recognition

The effect of the directives on mutual recognition is to give the qualifications awarded to nationals of Member States by the other Member States the same effect in the territory of the host state as those which the host state itself awards.[8] E.E.C. nationals are thus able to meet any general requirement for domestic qualifications by submitting evidence of the completion of this training in their country of origin.

No directives on mutual recognition were issued prior to the Reyners decision (2/74), but the opening up to non-nationals of all areas of self-employed activity, which this decision brought about, led the Council to act. In the six years following Reyners (2/74) five directives were issued on the mutual recognition of the qualifications of doctors,[9] nurses,[10] dentists,[11] veterinarians,[12] and midwives.[13] All are in the sensitive area of health care, and all are accompanied by a directive coordinating the training requirements in the various Member States.[14] The choice of the area for action and the manner of proceeding seems to indicate that the Council was motivated more by a desire to maintain standards than to facilitate the exercise of a Treaty right. This in itself is not objectionable as the end result is still helpful to the non-national, but it would also explain why the Council has not felt a similar need to act in other areas of endeavour.

The scheme of the directives is essentially always the same. Mutual recognition is accorded to certain specific national qualifications that are listed in the directive, provided that they have been awarded in accordance with the training requirements set out in the accompanying coordination directive.[15] Only the directive on midwives is different in this respect; it stipulates that, in addition to the listed qualification, non-national midwives must possess qualifications that give a right of admittance to a university or their equivalent, or a nursing qualification, or some practical experience, or a combination of these.[16] National health care qualifications that do not conform to the appropriate coordination directive will be given special recognition provided that they were awarded prior to the implementation of that directive and are accompanied by a certificate of active practice lasting for at least three consecutive years out of the last five preceeding the issue of the certificate.[17]

The directive on doctor's qualifications provides for the mutual recognition of two types of specialist qualifications, namely, those that are common to all Member States[18] and those that are peculiar to two or more among them.[19] In both cases it is again necessary that they be listed in the directive and awarded in accordance with Coordination Directive 75/363.[20] With respect to those qualifications that are peculiar to certain Member States, only those States with provisions on the matter are bound by the directive on mutual recognition.[21] Where any specialist qualifications do not conform to Coordination Directive 75/363, they are still to be recognized provided that they were awarded prior to the implementation of this latter directive.[22] However, in this case the host state may also require a certificate of practice for a period equal to twice the difference between the length of specialised training in the Member State awarding the qualification and the minimum training period required by the coordination directive.[23] Where the length of actual training is equal to or exceeds the required period, no certificate may be required.[24] Where, prior to the implementation of the coordination directive, the host state required a training period less than that stipulated in the directive, it is this training period that must be used in conjunction with the actual training period to determine the length of practice that is necessary.[25] The directive on dentists' qualifications includes identical provisions for the mutual recognition of specialist qualifications including those peculiar to two or more Member States.[26]

All the directives contain other measures in addition to mutual recognition. They provide a number of facilitative rules, such as the modification of oaths to accommodate non-nationals[27] and a procedure to enable non-nationals to establish their good character[28] and their mental and physical health.[29] They also include a number of liberalising provisions. In the case of establishment the host state is obliged to complete the necessary formalities within three months.[30] This provision is not strictly necessary, as a long delay would contravene the non-national's right to pursue his livelihood under the Treaty;[31] it does, however, serve to clarify the exact rights of the non-national in the matter. The same is true of the exemption accorded to non-national providers from registration with the social security body of the host state,[32] for such a requirement could well affect the provision of services without appearing to have sufficient objective justification.[33] The exemption from membership[34] or automatic membership[35] in the host state's professional body accorded by these directives to the providers of service, on the other hand, may well go beyond what is required by the Treaty.[36]

All the directives are based on Articles 57(1) and 66, which, because of their independence of Articles 52 and 60, give the Council unequivocal authority to act both during and after the transitional period. But the directives also apply to paid employees,[37] and here the Council seems to have been unclear whence to derive its authority. Although Article 49 empowers the enactment of whatever measures are required to bring about freedom of movement for workers, it does not specifically mention mutual recognition, and, more important, the direct applicability of Article 48 since the end of the transitional period could have deprived it of operative force. In issuing the first four directives on doctors, nurses, dentists and veterinarians, the Council may be covering itself by referring to its residual power under Article 235 in addition to Article 49. By the time of the 1980 directive on midwives, however, the Council's doubts have apparently resolved themselves in favour of the continued effectiveness of Article 49, which is given as the sole authority for the application of this directive to paid employees.

Coordination

There are four types of coordination directives that have been issued by the Council. The first is concerned directly with the coordination of national provisions concerning the taking up and pursuit of activities as self-employed persons and fits squarely within the authority bestowed upon the Council by Articles 57(2) and 66.[38] There are three such directives, two in direct insurance[39] and one on credit institutions including banks.[40]

The main thrust of the two insurance directives is the elimination of divergencies that exist between national supervisory legislation and in particular the setting out of common rules on the guarantee fund and solvency margin required of insurance undertakings.[41] The provisions of the two directives are essentially similar and cover the taking up and pursuit of direct insurance and the withdrawal of the authorisation to do so. Directive 79/267 on direct life insurance also includes facilitating measures with respect to proof of good repute and no previous bankruptcy.[42]

Each Member State is required to make the taking up of the business of direct insurance in its territory, whether through a primary or secondary establishment,[43] subject to an official authorisation.[44] The conditions that must be fulfilled by an undertaking in order to obtain the authorisation are standardised. An applicant must have adopted the necessary corporate form;[45] it must limit its activities to the field of insurance to the exclusion of all other commercial business;[46] it must submit a scheme of operations[47] that conforms to a scheme set forth in the directives;[48] and it must possess a minimum guarantee fund[49] as defined in the directives.[50] Member States are not permitted to make the authorisation subject to the lodging of a deposit or the provision of security.[51] Where the authorisation to take up business is refused, reasons must be provided and the undertaking concerned shall have the right to apply to the courts.[52]

The pursuit by an undertaking of the business of direct insurance is subject to the supervision of every Member State in which it possesses an establishment,[53] but only the supervisory authority of the state in which is situated the undertaking's head office shall verify its state of solvency with respect to its entire business.[54] This verification is to be carried out by seeing that the undertaking maintains an adequate solvency margin.[55] To ensure uniformity, the directives define the solvency margin[56] and what is to be considered adequate.[57] They also establish the need for and the composition and the minimum amount of the guarantee fund.[58]

Either the Member State in whose territory the head office is situated[59] or any Member State in which the undertaking has a secondary establishment[60] may withdraw the authorisation to carry on business. Where the authorisation of the primary establishment is withdrawn, all other Member States must withdraw their authorisations from the secondary establishments.[61] The loss of authorisation in a state of secondary establishment, however, does not have any further effect.[62] The authorisation may be withdrawn by any Member State where the undertaking no longer fulfils the conditions of admission or where it seriously contravenes national regulations,[63] but only the state of primary establishment may so act in the case of insolvency.[64] Reasons must be given in all these instances and the undertaking shall have the right to apply to the courts.[65]

The coordination achieved by Directive 77/780 on credit institutions is more modest in scope. Instead of uniform supervisory legislation, there are only certain minimum requirements, and little progress is made towards the ultimate goal of overall supervision of a credit institution by the Member State where the head office is situated.[66]

All Member States are required to make credit institutions obtain an authorisation before taking up their activities.[67] The minimum conditions for such authorisation are that the institution possess adequate and separate own funds[68] and that at least two persons of sufficiently good repute and sufficient experience effectively direct the business.[69] Applications for authorisation are also required to be accompanied by a programme of operations "setting out, inter alia the types of business envisaged and the structural organisation of the institution."[70] Reasons must be given for any refusal to issue an authorisation,[71] and the institution must have the right to apply to the courts.[72] No common rules are provided as regards the definition of adequate funds or the contents of the programme of operations, and each Member State is free to apply whatever additional provisions it wishes.[73]

Although the supervision of the activities of credit institutions is not coordinated,[74] some attempt is made to harmonize the procedure for withdrawing the authorisation to engage in them. The authorisation can only be lost where the institution does not make use of its authorisation within twelve months or has ceased to engage in business for more than six months,[75] where the authorisation was obtained through fraud or some other irregularity,[76] where the institution no longer fulfills the conditions of admission[77] or is in financial difficulty,[78] and where the national law so provides.[79] The last ground for withdrawal aptly illustrates the shortcomings of the directive, namely that it does not eradicate the idiosyncracies of the individual Member States. The provision that the authorisation of a secondary establishment must be withdrawn where that of the primary establishment is lost[80] would thus seem to put the institution in double jeopardy. Reasons must again be given for any action by a Member State,[81] and the institution has the right to apply to the courts.[82]

The second type of coordination is found in the five health care directives.[83] These are not directly concerned with the taking up and pursuit of self-employed activities but rather with the training required to obtain the qualifications necessary to carry on a certain activity. However, as the content of a professional qualification has a direct bearing on the taking up and pursuit of that profession, they surely fall within the purview of Articles 57(2) and 66. The Council's use of its residual power under Article 235 in the first four directives may indicate some initial doubts,[84] but Council Directive 80/155 on midwives omits any reference to this article. All five directives apply as well to paid employees,[85] for which the Council finds the necessary authority in Article 49 with a possible recourse again to Article 235.[86]

The scope of coordination in these directives is supposed to differ according to whether the training is for a general or a specialist qualification. According to the various preambles the comparable nature of general training courses means that coordination in this field can "be confined to the requirement that minimum standards be observed, which then leaves the Member States freedom of organisation as regards teaching."[87] Specialist training, on the other hand, is said in the preambles to require a greater coordination setting out minimum criteria "concerning the right to take up specialized training, the minimum training period, the method by which such training is given and the place where it is to be carried out, as well as the supervision to which it should be subject."[88] In fact no such distinction is made in the actual provisions, and in some way the training requirements for general qualifications are more rigorous.

All training programmes are subject to an academic prerequisite. Doctors, dentists and veterinarians must first qualify for university entrance in order to be admitted to a general programme;[89] nurses and midwives need a school-leaving certificate[90] or, where this is not available, a certificate resulting from a qualifying examination of equivalent standard for entrance to a nurse's training school for the former[91] or nursing qualifications for the latter.[92] Doctors and dentists must have successfully completed their general training before being admitted to specialist training.[93] All programmes have a minimum length ranging from six years for doctors' general training[94] to three years for dental and some medical specialties[94] to eighteen months for some midwives.[96] As regards the method by which the training is given, there is a general requirement that courses comprise both theoretical and practical training.[97] In the case of nurses and midwives Member States are enjoined to ensure that the institution training them is responsible for the coordination of theory and practice throughout the programme of studies.[98] No stipulation as to the content of specialist courses is given in the directives on doctors and dentists but, ironically in view of the views expressed in the preambles, Member States must guarantee that certain general areas are covered by the general training programmes[99] and, with the exception of doctors, ensure that various listed subjects are taught.[100] Personal participation of the trainee in the activities and responsibilities of the training establishment is required of medical and dental specialists[101] and, to a lesser extent, of nurses and midwives.[102] The supervision to which the trainee is subject also does not depend on the nature of the training programme. Although the requirements for the specialist training of doctors and dentists alone mention the need for supervision by competent authorities,[103] there is some provision for the supervision of nurses' and midwives' general training[104] and the university level courses leading to general qualifications in medicine, dentistry and veterinary science presuppose competent supervision. Finally, all directives, with the exception of the one on midwives, set out where the training is to be carried out, namely at a university or the equivalent for all courses in medicine, dentistry, and veterinary sciences[105] and at a nurses' training school for nurses.[106]

The last two types of coordination do not call for such detailed study, as they are not primarily concerned with the actual taking up and pursuit of a livelihood. Directive 71/305, for example, coordinates procedures for the award of public works contracts and, as such, aims more at establishing equal treatment for non-national construction undertakings. Only in the rare cases where access to such contracts is essential in order to make the right to a livelihood worthwhile will the directives have some indirect bearing on the taking up and pursuit of self-employed activity. It is therefore not surprising that the Council uses Article 100 of the Treaty as a buttress to its authority under Articles 57(2) and 66 to issue such a directive. The broad outlines of the coordination are the prohibition of technical specifications that have discriminatory effect,[107] common rules on advertising[108] and common criteria for participation in public works contracts[109] and the introduction of a procedure of joint supervision to ensure observation of the procedures.[110] A similar directive on the coordination of procedures for the award of public supply contracts[111] concerns the free movement of goods rather than personal mobility rights and is issued solely upon the basis of Article 100.

The final group comprises five directives that coordinate various aspects of company law such as pre-incorporation contracts,[112] the formation[113] and merging[114] of companies and the listing of corporate securities.[115] These directives only affect the taking up and pursuit of self-employed activities very indirectly by harmonising provisions regarding the vehicle through which such activities may be carried out. They belong essentially to the highly specialized area of Community corporate law and are issued pursuant to Article 54(3)(g) of the Treaty.[116]

Transitional Measures

There are twelve directives that provide transitional measures in order to facilitate the exercise of the right to a livelihood. Seven of these accompany and complement a liberalising directive on a certain activity[117] and five were issued after the Reyners decision (2/74) on the direct applicability of the Treaty.[118]

The main purpose of these directives is to provide a mechanism that will enable the nationals of Member States that permit free access to a certain activity to meet the requirements of those other Member States that make the taking up and pursuit of that same activity dependent on the possession of general, commercial or professional knowledge and ability.[119] This is done by obliging the Member States that impose such conditions to accept as sufficient evidence of the necessary qualifications the fact that an E.E.C. national has pursued the activity in question in another Member State for a period of time.[120] This period of time will vary according to both the activity in question and the circumstances under which it has been pursued. As regards the retail trade, for example, Directive 68/364 sets out the following rules:[121]

> "(a) three consecutive years either in an independent capacity or in a managerial capacity;
>
> (b) two consecutive years either in an independent capacity or in a managerial capacity, where the beneficiary can prove that for the occupation in question he has received previous training, attested by a certificate recognized by the State, or regarded by the competent professional or trade body as fully satisfying its requirements; or
>
> (c) two consecutive years in an independent capacity or in a managerial capacity, where the beneficiary can prove that he has pursued the occupation in question for at least three years in a non-independent capacity; or
>
> (d) three consecutive years in a non-independent capacity where the beneficiary can prove that for the occupation in question he has received previous training, attested by a certificate recognized by the State, or regarded by the competent professional or trade body as fully satisfying its requirements."

These provisions cover various combinations of independent and managerial experience with or without previous non-independent experience and domestic qualifications. With the exception of Directives 64/222 on the wholesale trade and commercial agents,[122] 70/523 on the coal trade[123] and 82/489 on hairdressing,[124] which allow for independent and managerial experience alone, the other directives permit almost any combination. The recognition of non-independent experience alone as a substitute for the conditions imposed by the host state is less common, and occurs only in Directives 68/364 on the retail trade,[125] 68/368 on personal services,[126] 74/556 on toxic products[127] and, to a much less extent, 77/92 on insurance agents and brokers.[128] All the directives require the experience in any capacity to have been obtained within a certain time prior to the application for authorisation to pursue the activity in the host state. This period runs from two[129] to ten years.[130] Proof that the foreign national meets the appropriate requirements is to be established by a certificate issued by the State whence he comes.[131] This arrangement could cause unnecessary problems, it seems, when the experience has been obtained in a third Member State.

These transitional arrangements are said in the various preambles to take the place of a coordination of national rules that is not immediately possible because of the irreconcilibility of the discrepancies between the Member States.[132] As a result all the directives, except Directives 82/470 and 82/489, provide that they remain applicable only until such coordination is achieved and implemented.[133] Coordination, however, is only concerned with a harmonisation of the required qualifications and not with the status in the host country of a foreign national's domestic qualifications. This is a matter for mutual recognition, and the transitional directives go some way towards providing it. In the rules that have been cited from Article 4 of Directive 68/364, paragraphs (b) and (d) both accord recognition to domestic certificates, albeit in conjunction with some practical experience. Most of the other directives contain similar provisions.[134] None of the directives have as yet been supplanted by coordination, but it would be unfortunate if alternative measures to preserve or increase this limited mutual recognition of qualifications did not accompany the coordination.[135]

An ancillary purpose of some of the directives that were issued prior to Reyners (2/74)[136] was to avoid a disproportionate influx into the more liberal Member States of non-nationals who did not satisfy the conditions of admission to an activity in the country whence they came.[137] This purpose was achieved by permitting a Member State that allowed free access to require nationals of other Member States to possess the qualifications necessary for the pursuit of the activity in the country whence they came.[138] This could only be done with authorization from the Commission and in respect of a specified activity and for a limited period.[139] The requirement was, of course, discriminatory and contrary to Articles 52 and 60 of the Treaty,[140] which require non-nationals to be treated in the same way as nationals. As long as it was up to the Council to decide upon the extent of liberalisation under Articles 54(2) and 63(2) of the Treaty, it was free to limit a non-national's right to a livelihood in this way. However, since the Treaty was declared by the Court of Justice in Reyners (2/74) to be directly applicable, the right derives from Articles 52 and 60, which prohibit such discrimination. None of the transitional directives issued after Reyners (2/74) include this provision,[141] which must have also become inoperative in those earlier directives that contain it.

The five transitional directives that were issued after the Treaty was declared directly applicable do not need to be accompanied by an appropriate liberalising directive. As a result it was necessary to include them in certain facilitative measures that would normally have been part of that liberalising directive. All five provide a mechanism to enable a non-national to prove good repute, no previous bankruptcy and financial standing,[142] and Directive 77/92 also requires that Member States adapt any oath that may have to be taken.[143]

The introduction of these transitional arrangements is suggested by the general programmes,[144] but they are applied by the directives in some cases to paid employees as well.[145] There is, however, no express authority in the Treaty for such measures. Prior to Reyners (2/74) the Council relied on Articles 54(2) and 63(2) as well as Articles 57 and 66 with respect to self-employed persons. Once Articles 54(2) and 63(2) became, at least in the view of the Council, inoperative upon the direct applicability of Articles 52 and 60, the Council was obliged to rely on Articles 57 and 66 alone. It appears to have entertained some doubts as to the sufficiency of this authority, for Directives 74/556, 75/368, 75/369 and 77/92 use Article 235 as additional authority for their enactments and even take the unusual step for post-Reyners directives of eliciting support from the general programmes.[146] However, by the time Directives 82/470 and 82/489 were issued, these doubts have gone, and the two directives are based solely on Articles 57 and 66. As far as paid employees are concerned, four[147] of the directives that apply to them as well use a combination of Articles 49 and 235 for the same reasons as were mentioned earlier in the case of mutual recognition,[148] while Directives 82/470 and 82/489 use Article 49 alone.

Other Facilitative Measures

Many of the directives also contain additional miscellaneous provisions to enable non-nationals to conform to valid national rules that are not covered by the other harmonising measures. Prior to Reyners (2/74) they are found exclusively in the liberalising directives,[149] but subsequently they appear in the harmonising directives on mutual recognition,[150] coordination,[151] and transitional arrangements.[152] There are three groups of such facilitative measures dealing, respectively, with matters of proof, the adaptation of national rules to accommodate non-nationals, and administrative requirements.

A common prerequisite for the taking up of an activity in the Member State is proof of good repute and no previous bankruptcy.[153] Slightly less frequent is the requirement that a person prove his financial standing.[154] Persons wishing to establish themselves as doctors, nurses, dentists, veterinarians or midwives may have to produce a document attesting their physical or mental health.[155] In all these cases the non-national is as capable as nationals of possessing the necessary attribute, so that all is needed is a mechanism to enable him to adduce the requisite proof.

Good repute and no previous bankruptcy can be established by the production of an extract from the "judicial record" in the country of origin[156] or, failing this, by an equivalent document.[157] Where neither are available, such proof may be replaced by a declaration on oath or solemn declaration made by the non-national concerned before a competent authority in the country of origin, which must also issue a certificate attesting the authenticity of the declaration.[158] Some directives provide in addition that, where the judicial extract or equivalent are not sufficiently informative as to good repute, they may be replaced by an official certificate from the country of origin showing that the specific requirements of the host state have been met.[159] Where such a certificate is not obtainable, the declaration is again acceptable instead.[160] The health care directives do not include any provisions as regards bankruptcy and provide a somewhat different mechanism for good repute. The host state must either accept a certificate attesting that the non-national has met the requirements as to good repute or character that are set as a prerequisite in the country of origin,[161] or, where such a certificate is not issued, it may require a judicial extract or equivalent document.[162] No provision is made for a declaration where this proof is not available. The mechanism only applies in the case of establishment, as proof of good repute or character is not required of providers of services.[163]

Proof of financial standing can be established by a certificate issued by a bank in the country of origin, where this method of proof is available to nationals with respect to banks in the host state.[164] At least this would seem to be the limited intent of the identical wording in the various directives, which only obliges Member States to "regard certificates issued by banks in the Member State of origin or in the country whence the foreign national comes as equivalent to certificates issued in its own territory."[165] No provision is made for the situation where such certificates do not constitute sufficient proof.

Persons wishing to establish themselves in the area of health care may be required to prove mental or physical health. They are able to do so by presenting the document that is required in their country of origin.[166] Where the latter state does not impose such a prerequisite as to health, the host state must accept as a substitute a certificate issued by a competent authority in the country of origin.[167] As with proof of good character or repute, and for the same reason, the mechanism does not apply to providers of services.[168]

The adaptation of national rules affects mainly lawyers, for whom a whole directive of facilitative measures has been issued. Directive 77/249 was issued after the Reyners decision (2/74), one consequence of which was to give lawyers a right to pursue their livelihood throughout the Community, and it enables non-national lawyers to practice in other Member States as providers of services only.[169] Even within this narrow category it exempts the preparation of probate and conveyancing documents from the scope of the directive.[170] The mechanism that is set up calls for the recognition by each Member State that persons with certain designated titles are lawyers[171] and arrangements for them to provide services in the host state,[172] including the representation of a client in legal proceedings.[173] The host state may, however, require foreign lawyers who wish audience before its courts to be introduced properly and to work in conjunction with a national lawyer.[174] The recognition that is accorded under this directive relates solely to the status of the non-national as a lawyer in his country of establishment; it does not extend to a mutual recognition of this status throughout the Community, which would, of course, permit the non-national lawyer to exercise his right of livelihood beyond the restricted scope of the directive and without the intervention of a national lawyer.[175] The limited nature of the recognition is also reflected in the prescribed use of the domestic professional title[176] and the continued subjection of the non-national to the rules of conduct of the country of establishment in addition to those of the host state.[177]

The only general adaptation of national rules is the provision in various directives, including all the health care directives but not the one on lawyers, that the formulation of any obligatory oath be modified to ensure that non-nationals are able to take it.[178] Usually this modification applies to both establishment and services,[179] but in the directives on dentists, veterinarians and midwives it only appears under the rubric of measures to facilitate establishment.[180] Presumably an oath is not required of the providers of services in these activities, for otherwise there would be no point to the distinction.

Finally, there are measures of an administrative nature that assure an easier access to the activity in question. With respect to the provision of services in the health care area, the pertinent directives set down that a non-national may only be required to furnish a declaration concerning the details of the services to be provided, a certificate from the state of establishment verifying that he is lawfully pursuing his activities there, and a similar certificate attesting that his qualifications fall within the directive on mutual recognition.[181] In cases of urgency the declaration may be made as soon as possible after the services have been completed.[182] These requirements only apply to non-nationals, but their standardization and the recognition accorded to the certificates issued by the country of establishment place them among the miscellaneous facilitative measures. The use of a title in the host state, which is an essential ingredient in a professional practice, is also regulated by the health care directives. They provide that the domestic title is to be used,[183] with some modification where it conflicts with a higher title in the host state,[184] unless the host state requires the use of its own corresponding professional title.[185] Somewhat different, but also in this last category, are the common rules adopted in Directives 63/607 and 65/264 for establishing Community nationality for a film.[186]

FOOTNOTES

Chapter 3C

[1] *See* Chapter 3B, fn. 179 for a brief discussion on how the Court of Justice has applied this principle.

[2] *See* the discussion in Chapter 1, pp. 22-23.

[3] *See* Article 1 of the directive and the discussion, *infra*, p. 267.

[4] *See* Chapter 3B on the restrictions on the right to pursue a livelihood to see how the Court of Justice has acted.

[5] Hans Smit and Peter Herzog, *The Law of the European Economic Community* (New York: Matthew Bender, 1976-1982), II, p. 2-633; P. Leleux, "Recent Decisions of the Court of Justice in the Field of Free Movement," *European Law and the Individual* (Amsterdam/New York/Oxford: North-Holland Publishing Company, 1976), ed. F.G. Jacobs, p. 84; H. Bronkhorst, "Freedom of Establishment and Freedom to Provide Services under the EEC Treaty," (1975), 12 *C.M.L. Rev.* 245 at 251-252.

[6] *See* E.C. Comm., 8th Report at No. 122 (1975).

[7] Article 57(3) makes only the progressive abolition of restrictions "dependent upon coordination of the conditions for their [health care and pharmacy] exercise in the various Member States."

[8] See Co. Dirs. 75/352, arts. 2, 4, 6; 77/452, art. 2; 78/686, arts. 2, 4; 78/1026, art. 2; 80/154, art. 2. This recognition extends only to the right to take up professional activities; it does not imply a recognition of academic equivalence that could be used as a basis for admission to a graduate programme in another Member State - *see* R. Wägenbaur, "The Mutual Recognition of Qualifications in the EEC," *European Law and the Individual* (Amsterdam/New York/Oxford, 1976), ed. F.G. Jacobs, p. 100.

[9] Directive 75/362.

[10] Directive 77/452.

[11] Directive 78/686.

[12] Directive 78/1026.

[13] Directive 80/154.

[14] Directives 75/363 (doctors); 77/453 (nurses); 78/687 (dentists); 78/1027 (veterinarians); 80/155 (midwives).

[15] Co. Dirs. 75/362, art. 2; 77/452, art. 2; 78/686, art. 2; 78/1026, art. 2; 80/154, art. 2.

[16] See 80/154, art. 2.

[17] Co. Dirs. 75/362, art. 9(1); 77/452, art. 4; 78/686, art. 7(1), 78/1026, art. 4. Co. Div. 80/154, art. 5 provides for the recognition of midwives' qualifications in this category where they are awarded prior to or up to six years after notification of the directive.

[18] Co. Dir. 75/362, art. 4 - e.g. the specialty of anaesthetics or gynaecology.

[19] Co. Dir. 75/362, art. 6 - e.g. immunology, which is common to only Ireland and the United Kingdom.

[20] Co. Dir. 75/362, arts. 4 and 6.

[21] Co. Dir. 75/362, art. 6.

[22] Co. Dir. 75/362, art. 9(2).

23. Ibid.

[24] Ibid.

[25] Ibid.

[26] Co. Dir. 78/686, arts. 4, 5, 7(2).

[27] Co. Dirs. 75/362, art. 19; 77/452, art. 14; 78/686, art. 14, 78/1026, art. 11; 80/154, art. 12.

[28] Co. Dirs. 75/362, art. 11; 77/452, art. 6; 78/686, art. 9; 78/1026, art. 6; 80/154, art. 7.

[29] Co. Dirs. 75/362, art. 13; 77/452, art. 8; 78/686, art. 11; 78/1026, art. 8; 80/154, art. 9.

[30] Co. Dirs. 75/362, art. 15; 77/452, art. 10; 78/686, art. 13; 78/1026, art. 10; 80/154, art. 11.

[31] See Chapter 3B, p. 215.

[32] Co. Dirs. 75/362, art. 17; 77/452, art. 12; 78/686, art. 16; 80/154, art. 14. Veterinarians do not come under any social security scheme.

[33] See Chapter 3B, pp. 235-236.

[34] Co. Dirs. 75/362, art. 16(1); 77/452, art. 11(1); 78/686, art. 15(1); 78/1026, art. 12(1); 80/154, art. 13(1).

[35] Co. Dirs. 75/562, art. 16(1) (as amended by Directive 82/76); 78/686, art. 15(1); 78/1026, art. 12(1).

[36] See Chapter 3B, pp. 228-229.

[37] Co. Dirs. 75/362, art. 24; 77/452, art. 18; 78/686, art. 23; 78/1026, art. 17; 80/154, art. 19.

[38] Article 57(2) empowers the Council to issue directives "for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons."

[39] Directive 73/239 on direct insurance other than life assurance and Directive 78/267 on direct life assurance. The latter directive is also based on Article 49, although it does not affect paid employees.

[40] Directive 77/780. Various institutions are excluded from the scope of the directive, including the central banks of the Member States - see Article 2.

[41] There are, however, no common rules as to technical reserves.

[42] Article 37. The corresponding provisions for direct insurance other than life insurance are contained in Liberalisation Directive 73/240, art. 3.

[43] Co. Dirs. 73/239, art. 6(2); 79/267, art. 6(2).

[44] Co. Dirs. 73/239, art. 6(1); 79/267, art. 6(1).

[45] Co. Dirs. 73/239, art. 8(1)(a); 79/267, art. 8(1)(a).

[46] Co. Dirs. 73/239, art. 8(1)(b); 79/267, art. 8(1)(b).

[47] Co. Dirs. 73/239, art. 8(1)(c); 79/267, art. 8(1)(c).

[48] Co. Dirs. 73/239, art. 9; 79/267, art. 9.

[49] Co. Dirs. 73/239, art. 8(1)(a); 79/267, art. 8(1)(d).

[50] Co. Dirs. 73/239, art. 17(2); 79/267, art. 20(2).

[51] Co. Dirs. 73/239, art. 6(2); 79/267, art. 6(2).

[52] Co. Dirs. 73/239, art. 12; 79/267, art. 12.

[53] Co. Dirs. 73/239, arts. 13, 14, 15, 20, 22; 79/267, arts. 15, 16, 17, 24, 26.

[54] Co. Dirs. 73/239, art. 14; 79/267, art. 16.

[55] Co. Dirs. 73/239, art. 16(1); 79/267, art. 18, para. 1.

[56] Co. Dirs. 73/239, art. 16(1),(2); 79/267, art. 18.

[57] Co. Dirs. 73/239, art. 16(3), (4), (5); 79/267, art. 19.

[58] Co. Dirs. 73/239, art. 17; 79/267, art. 20.

[59] Co. Dirs. 73/238, art. 22(1); 79/267, art. 26(1).

[60] Co. Dirs. 73/239, art. 22(2); 79/267, art. 26(2).

[61] Co. Dirs. 73/239, art. 22(1); 79/267, art. 26(1).

[62] Co. Dirs. 73/239, art. 22(2); 79/267, art. 26(2).

[63] Co. Dirs. 73/239, art. 22(1)(a),(c); 79/267, art. 26(1)(a),(c).

[64] Co. Dirs. 73/239, art. 22(1)(b); 79/267, art. 26(1)(b).

[65] Co. Dirs. 73/239, art. 22(3); 79/267, art. 26(3).

[66] This is stated to be the ultimate goal in the third recital of the Preamble to Directive 77/780.

[67] Article 3(1).

[68] Article 3(2), 1st and 2nd indents.

[69] Article 3(2), para. 1, 2nd indent and para. 2.

[70] Article 3(4).

[71] Article 3(6).

[72] Article 13.

[73] Article 3(2), which sets down the minimum conditions for authorisation, operates "without prejudice to other conditions of general application laid down by national laws." See also Articles 4 and 8(1)(e).

[74] Article 7 merely provides for collaboration between the supervisory authorities of the Member States.

[75] Article 8(1)(a).

[76] Article 8(1)(b).

[77] Article 8(1)(c).

[78] Article 8(1)(d).

[79] Article 8(1)(e).

[80] Article 8(2).

[81] Article 8(5).

[82] Article 13.

[83] Directives 75/363 (doctors), 77/453 (nurses), 78/687 (dentists), 78/1027 (veterinarians) and 80/155 (midwives).

[84] These doubts may, of course, be connected with the inclusion of paid employees as beneficiaries of the directives - see the discussion, supra, pp. 254-255.

[85] Co. Dirs. 75/363, art. 6; 77/453, art. 3; 78/687, art. 7; 78/1027, art. 2; 80/155, art. 5.

[86] See the discussion, supra, pp. 254-255.

[87] Co. Dirs. 75/363, 77/453, 78/687 and 78/1027, 1st recital. The first recital to the Preamble of Directive 80/155 is couched in somewhat different language, but the import is the same.

[88] Co. Dirs. 75/363, 78/687, 2nd recital.

[89] Co. Dirs. 75/363, 78/687, 78/1027, art. 1(3).

[90] Co. Dirs. 77/453, art. 1(2)(a); 80/155, art. 1(2), first indent.

[91] Co. Dir. 77/453, art. 1(2)(a).

[92] Co. Dir. 80/155, art. 1(2), second indent.

[93] Co. Dirs. 75/363, 78/687, art. 2(1)(a).

[94] Co. Dir. 75/363, art. 1(2).

[95] Co. Dirs. 78/687, art. 2(1)(c); 75/363, arts. 4, 5.

[96] Co. Dir. 80/155, art. 1(2), second indent.

[97] Co. Dirs. 75/363, 78/687, 78/1027, art. 1(2), 77/453, art. 1(2)(b) and 80/155, art. 1(2), first indent with regard to general training; Co. Dirs. 75/363, 78/687, art. 2(1)(b) as regards specialist training.

[98] Co. Dir. 77/453, art. 1(3); 80/155, art. 1(4).

[99] Co. Dirs. 75/363, 77/453, 78/687, 78/1027, and 80/155, art. 1(1). Nurses are specifically made subject to examination in these areas - Co. Dir. 77/453, art. 1(1).

[100] Co. Dirs. 77/453, art. 1(2)(b); 78/687, art. 1(2); 78/1027, art. 1(2); 80/155, art. 1(3).

[101] Co. Dirs. 75/363, 78/687, art. 2(1)(c).

[102] Co. Dirs. 77/453, art. 1(3); 80/155, art. 1(4).

[103] Co. Dirs. 75/363, 78/687, art. 2(1)(c).

[104] Co. Dirs. 77/453, art. 1(3); 80/155, art. 1(4).

[105] Co. Dirs. 75/363, 78/687 and 78/1027, art. 1(2).

[106] This would seem to be the implication of Co.Dir. 77/453, art. 1(2)(a).

[107] Articles 10, 11.

[108] Articles 12 - 19.

[109] Articles 20 - 22.

[110] See Article 29(5).

[111] Directive 77/62.

[112] Council Directive 68/151/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community. Dated 9 March, 1968, 1968 J.O. L165, p. 8 (S. Edn. 1968 (1) p. 41). This directive also deals with disclosure, corporate agency generally and nullity of the company.

[113] Council Directive 77/91/EEC on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent. Dated 13 December, 1976, 1977 O.J. 6/26, p. 1.

[114] Council Directive 78/855/EEC based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies. Dated 9 October, 1978, 1978 O.J. L/295, p. 36.

[115] Council Directive 79/279/EEC coordinating the conditions for the admission of securities to official stock exchange listing. Dated 5 March, 1979, 1979 O.J. L/66, p. 21.

[116] It is noteworthy that the Council considers Article 54(3)(g) to have operative effect even after the end of the transitional period even though it is a guideline for the Council's legislation under Article 54(2), which has fallen into desuetude since that time.

[117] These are Directives 64/222, 64/427, 68/364, 68/366, 68/368, 70/523 and 74/556.

[118] These are Directives 75/368, 75/369, 77/92, 82/470, and 82/489.

[119] *See* the Preamble to Directive 64/222, 4th recital:

"Whereas, in the absence of immediate coordination, it nevertheless appears desirable to make it easier to attain freedom of establishment and freedom of services in respect of the activities in question by the adoption of transitional measures of the kind envisaged in the General Programme; *whereas this should be done primarily in order to avoid causing exceptional difficulties for nationals of Member States in which the taking up of such activities is not subject to any conditions*;" (emphasis added).

All the other directives contain a similar recital in the preamble.

[120] Co. Dirs. 64/222, art. 2; 64/427, art. 3; 68/364, art. 4; 68/366, art. 4; 68/368, art. 4; 70/523, art. 3; 74/556, arts. 2, 3; 75/368, arts. 5, 7; 65/369, arts. 5, 6; 77/92, arts. 4, 5, 6, 7, 82/470, art. 6; 82/489, art. 2.

[121] Article 4.

[122] Article 2.

[123] Article 3.

[124] Article 2.

[125] Article 4.

[126] Article 4.

[127] Articles 2, 3.

[128] Article 6(1)(a).

[129] Co. Dirs. 64/222, art. 2; 70/523, art. 3; 74/556, art. 3.

[130] Co. Dirs. 64/427, art. 3; 68/364, art. 4(2); 68/366, art. 4(1); 68/368, art. 4(2); 75/368, art. 7(2), 75/369, art. 5(2); 77/92, art. 7; 82/489, art. 12(2).

[131] Co. Dirs. 64/222, art. 4(2); 64/247, art. 4(2); 68/364, art. 6(2); 68/366, art. 5(2); 68/368, art. 6(2); 70/523, art. 4(2); 74/556, art. 4(2); 75/368, art. 9; 75/369, art. 8; 77/92, art. 9(1).

[132] *See* the second, third, and fourth recitals of Directive 68/364:

"Whereas not all Member States impose conditions for the taking up and pursuit of activities in retail trade; whereas, while in some cases there is freedom to take up and pursue such activities, in other cases there are stringent provisions making the taking up and pursuit thereof subject to possession of formal qualifications;"

"Whereas the Council, at the time of approving the General Programmes, found that in respect of retail trade coordination and recognition pose problems, the solution of which requires detailed preparation;"

"Whereas it is therefore not possible to effect the coordination provided for at the same time as the abolition of restrictions; whereas such coordination must be effected at a later date;"

Similar recitals are to be found in the preambles to the other directives.

[133] Co. Dirs. 64/222, art. 5; 64/427, art. 6; 68/364, art. 7; 68/366, art. 7; 68/368, art. 7; 70/523, art. 523; 74/556, art. 6; 75/368, art. 11; 75/369, art. 11; 77/92, art. 12.

[134] Co. Dirs. 64/427, art. 4(1)(b),(d); 68/366, art. 4(1)(b),(d); 68/368, art. 4(1)(b),(d); 74/556, arts. 2(c),(d),(e) and 3(b),(c),(d),(e); 75/368, art. 7(1)(b),(d); 75/369, arts. 5(1)(b),(d) and 6(1),(b),(d); 77/92, arts. 4(c), 5(1)(c) and 6(1)(b); 82/470, arts. 6(1)(d), 6(2)(d) and 6(3)(d); 82/489, art. 2(1)(b).

[135] It should be noted that Title V of the General Programme on establishment and Title VI of the General Programme on services see the transitional measures as a substitute for mutual recognition as well.

[136] See Directives 64/222; 64/427, 68/364, 68/366, 68/368.

[137] See the sixth recital to the Preamble of Directive 64/222:
"Whereas, as regards States which do not make the taking up of the activities in question subject to any rules, in order to avoid a disproportionate influx into those States of persons who are unable to satisfy the conditions laid down in respect of the taking up and pursuit of such activities in the country whence they come, provision should be made for those States to be authorised, where appropriate and in respect of one or more activities, to require nationals of other Member States to furnish proof that they are qualified to pursue the activity in question in the country whence they come."

Directives 64/427, 68/364, 68/366 and 68/368 have a similar recital in their preambles.

[138] Co. Dirs. 64/222, art. 3(1); 64/427, art. 5(1); 68/364, art. 6(1); 68/366, art. 6(1); 68/368, art. 5(1).

[139] Ibid.

[140] It is also contrary to Article 48, but it is not included in any directive that applies to paid employees.

[141] See Directives 75/368, 75/369, 77/92, 82/470 and 82/489.

[142] Co. Dirs. 75/368, art. 3; 75/369, art. 3; 77/92, art. 10; 82/470, art. 4; 82/489, art. 4.

[143] Article 11.

[144] Title V of the General Programme on establishment and Title VI of the General Programme on services.

[145] Directives 74/556, 75/368, 75/369, 77/92, 82/470 and 82/489 apply to paid employees as well.

[146] See the third recital of the preamble to Directive 75/368:

> "Whereas, in the absence of mutual recognition of diplomas or of immediate coordination it nevertheless appears desirable to make it easier to attain freedom of establishment and freedom to provide services for the activities in question, in particular by the adoption of transitional measures of the kind envisaged in the General Programmes...."

A similar recital is found in the preambles to 75/369 and 77/92.

[147] See Directives 74/556, 75/368, 75/269 and 77/92.

[148] See, supra, pp. 254-255.

[149] See Directives 65/1 and 71/18 on agricultural services, 73/183 on credit institutions, and 63/607 on the film industry. A perusal of the summary of directives will complete the list.

[150] All the health care directives on mutual recognition include facilitative measures; see Directives 75/362; 77/452; 78/686; 78/1026; 80/154.

[151] See Co. Dir. 79/267, art. 37.

[152] All the transitional directives issued after Reyners (2/74) contain facilitative measures. See Directives 77/92 on insurance, 75/368 on various miscellaneous activities, 75/369 on itinerant trades, 82/470 on transport and travel agencies and 82/489 on hairdressing.

[153] It occurs in all the areas covered by the directives except for the provision of services by lawyers.

[154] It is required in the area of the film industry (68/369, 70/451), the food industry (68/365), the hotel and catering industry (68/367), the manufacturing and processing industry (64/429), mining, quarrying, prospecting and drilling activities (64/428, 69/82), miscellaneous activities (75/368), itinerant trade (75/369), public utility undertakings (66/162), real estate business (67/43), toxic products (74/557), retail trade (68/363), transport and travel agencies (82/470), and hairdressing (82/489).

[155] See Co. Dir. 75/362, art. 13. A similar provision occurs in the other health care directives.

[156] See Co. Dirs. 65/1, art. 6(1); 71/18, art. 7(1); 68/365, art. 6(1), para. 1. Where the non-national comes from a third Member State, all documents and certificates are to be provided by the country whence he comes.

[157] Ibid.

[158] See Co. Dirs. 65/1, art. 692); 71/18, art. 7(2); 68/365, art. 6(1).

[159] See Co. Dirs. 71/18, art. 7(3), 75/368, art. 3(2); 74/557, art. 7(2).

[160] See Co. Dirs. 71/18, art. 7(3), 75/368, art. 3(3); 74/557, art. 7(3). The last two directives are much clearer on this point than Directive 71/18, but it would seem that the same mechanism applies in all three cases.

[161] Co. Dirs. 75/362, art. 11(1); 77/452, art. 6(1); 78/686, art. 9(1); 78/1026, art. 6(1); 80/154, art. 7(1).

[162] Co. Dirs. 75/362, art. 11(2); 77/452, art. 6(2); 78/686, art. 9(2); 78/1026, art. 6(2); 80/154, art. 7(2).

[163] *See* Chapter 3B, pp. 227-228.

[164] *See* Co. Dirs. 68/369, art. 4(4); 70/452, art. 6(4); 75/368, art. 3(7).

[165] Ibid.

[166] Co. Dirs. 75/362, art. 18; 77/452, art. 8; 78/686, art. 11; 78/1026, art. 8; 80/154, art. 9.

[167] Ibid.

[168] *See* Chapter 3B, pp. 227-228.

[169] Articles 1(1), 2.

[170] Article 1(1), para. 2. This is probably because notaries, who perform this type of work on the continent, are not included as beneficiaries.

[171] Article 2.

[172] Articles 1(1), 2.

[173] Article 5.

[174] Ibid.

[175] *See* R. Wägenbaur, op. cit., p. 100.

[176] Article 3.

[177] Article 4(2), (4).

[178] *See* Co. Dirs. 67/43, art. 9; 70/522, art. 8; 75/362, art. 19.

[179] Ibid.

[180] Co. Dirs. 68/686, art. 14; 68/1026, art. 19; 80/154, art. 12.

[181] Co. Dirs. 75/362, art. 16(3); 77/452, art. 4(3); 78/686, art. 15(3); 78/1026, art. 12(3); 80/154, art. 13(3).

[182] Co. Dirs. 75/362, art. 16(2); 77/452, art. 11(2); 78/686, art. 15(2); 78/1026, art. 12(2); 80/154, art. 13(2).

[183] Co. Dirs. 75/362, art. 10(1); 77/452, art. 5(1); 78/686, art. 8(1); 78/1026, art. 5(1); 80/154, art. 6(1).

[184] Co. Dirs. 75/362, art. 10(2); 77/452, art. 5(2); 78/686, art. 8(2); 78/1026, art. 5(2); 80/154, art. 6(2).

[185] Co. Dirs. 75/362, art. 18; 77/452, art. 13; 78/686, art. 17; 78/1026, art. 13; 80/154, art. 15.

[186] Co. Dirs. 63/607, arts. 3, 4; 65/264, art. 2.

Chapter 3D

THE SCOPE OF THE RIGHT

The Company or Firm as Beneficiary of the Right

Title I of both general programmes includes companies and firms as beneficiaries of the right to pursue a livelihood in another Member State in accordance with Article 58 of the Treaty.[1] The great majority of the directives on self-employed activities that were issued prior to the direct applicability of the Treaty adopt Title I and apply to "natural persons and companies or firms covered by Title I of the General Programmes...."[2] Five of the agricultural directives omit the reference to Title I but nonetheless apply to "nationals and companies or firms of other Member States."[3] Two other directives, 63/262 on agriculture and 63/607 on the film industry, identify their beneficiaries rather vaguely as "persons specified under Title I of the General Programme...."[4] This formulation seems at first sight to exclude companies and firms, particularly when it is compared to the unequivocal language of the directives mentioned previously. However, "persons" clearly includes companies and firms in Title I[5] and no such exclusion is intended. In fact, the only directive issued prior to direct applicability that does exclude companies and firms is Directive 63/261, which confers the general freedom to pursue agricultural activities exclusively on "nationals of other Member States _having been employed_ in its territory...as _paid agricultural workers_;"[6] clearly no company or firm can come within this definition.

The limitation in scope of Directive 63/261 does not survive the direct applicability of a Treaty, from which companies and firms derive henceforth their right to do business in other Member States.[7] The Treaty does not, however, prevent a Member State from maintaining a law of general application that prohibits all companies or firms regardless of nationality from pursuing a certain activity. This is the case throughout the Community with respect to the professions, which must be carried on by an individual who has obtained the appropriate qualifications.[8] Thus, the directives on the mutual recognition and coordination of qualifications and training in the health care area and on the facilitation of the provision of legal services all apply only to natural persons.[9]

The General Prerequisites of Entry, Residence and Corporate Recognition

In order to exercise the right to pursue a livelihood, an individual must be able to enter and reside in the host state and a company has to obtain legal recognition of its corporate status.[10] Anything that prevents the fulfilment of these prerequisites, therefore, will render the right incapable of exercise. All of these possible obstacles have been discussed earlier in this study so that a brief survey of them will suffice here.

Public policy exception. A Member State may deny entry or residence to or withdraw the right of residence from any non-national on grounds of public policy, public security and public health.[11] Although Article 56(1) of the Treaty extends this sanction to the whole area of establishment and services, including the right to pursue a livelihood, the Council has seen fit to restrict it in its implementing legislation to the areas of entry and residence for both employed and self-employed persons[12]. This restriction is probably binding on the Member States.[13] Nevertheless, when a Member State denies entry or residence to a non-national worker or self-employed person, this obviously affects his right to pursue a livelihood very closely, for the right cannot be exercised without a physical presence in the host state.[14] The same is true of a company that cannot obtain or which loses the recognition of its corporate status for reasons of public policy or public security;[15] it cannot carry on business where it lacks the legal capacity to do so.

The restrictive definition of the work connection. In order to enjoy the rights of entry and residence and of corporate recognition at Community law,[16] a non-national must demonstrate the necessary work connection.[17] This is not always possible. Paid employees may not qualify if they are working for a domestic employer who is not providing services to the host state in question,[18] while companies and self-employed persons are definitely excluded if they wish to set up a temporary establishment in another Member State.[19] The latter are possibly also excluded where the person for whom they are providing services in another Member State resides in their own state of establishment.[20] Companies and firms must demonstrate in addition that they have at least as a secondary purpose the making of a profit.[21]

With the exception of providers, who are confined by some of the directives to providing services for recipients who reside in the very state where the services are being performed,[22] the secondary legislation implementing the right to pursue a livelihood does not expressly reiterate these restrictions.[23] However, not too much significance should be attached to this fact, as there is little point to having the right if one cannot be present to exercise it.

Non-E.E.C. employees. Non-E.E.C. nationals do not enjoy any autonomous rights of entry and residence under the Treaty or the subsidiary legislation implementing these rights, but this must be considered an inconvenience rather than a restriction on their right to work in another Member State.

For this latter right derives from their employers, who have a right at Community law to the services of non-E.E.C. personnel where these are indispensable.[24] Nevertheless, the absence of specific provisions regulating the rights of entry and residence of non-E.E.C. employees can lead to delays and bureaucratic obfuscation that could hamper their ability to take up their positions in a host state, which, in turn, would impair their employer's right to pursue his livelihood. As was suggested earlier, the answer would seem to be that they are entitled to the same treatment as non-E.E.C. family members, whose rights of entry and residence are equally derivative.[25]

Corporate recognition. At present there is no right at Community law to corporate recognition, which must be obtained on the basis of national law alone.[26] In the case of the provision of services and secondary establishment there are no problems, as all Member States readily accord the necessary recognition. There are problems, however, when a company wishes to transfer its primary establishment to another Member State, as the application of the real seat theory in some Member States makes such a transfer impossible.[27] But the incidence of companies being thus thwarted in their pursuit of a livelihood is not high, as, in most cases, a company will want to expand its activities to include other Member States rather than transfer its existing establishment.

The Prerequisite of Establishment

A self-employed person or a company or firm may only do business in a host state by way of the provision of services or through a secondary establishment where they can show that they already have an existing primary establishment within the Community.[28] In the case of the provision of services, this means that they may be carried out "only on a temporary basis...*the centre...of operations remaining fixed in another Member State*."[29] In order to set up a secondary establishment, the primary establishment may be in any Member State.[30] Where the appropriate primary establishment cannot be shown to exist, there is no right to pursue a livelihood.

The Treaty contains no definition of the term "primary establishment." Title I of both general programmes suggests that for companies the prerequisite is met if they have either their principal place of business or their centre of administration within the Community.[31] Where, however, only the registered office is within the Community, a company will have to demonstrate "a real and continuous link with the economy of a Member State,"[32] probably in the form of investments or business activity. This approach taken by the general programmes seems to offer a reasonable interpretation of the term.[33] As far as natural persons are concerned, they will normally have only a principal place of business or a "centre of operations,"[34] and it is presumably either of these that must be situated in an appropriate Member State.

The Question of Nationality

The necessity for E.E.C. nationality. Articles 52, 59 and 60 of the Treaty, Title I of the general programmes and all the directives limit the right to pursue self-employed activities in other Member States to E.E.C. nationals. The provision in the second paragraph of Article 59 for an extension to non-E.E.C. nationals of the right to provide services has not been acted upon. The limitation in the directives is achieved either through the incorporation of Title I of the general programmes[35] or by a specific exclusion of non-E.E.C. nationals.[36] The presence of the limitation in the Treaty is the most significant, however, as it means that it will survive direct applicability.

Article 48(2) of the Treaty appears to be similarly restrictive with respect to employees, unless the required abolition of discrimination based on nationality "between workers of the Member States as regards employment"[37] can be interpreted more broadly to include discrimination against all workers of a Member State whether or not they possess E.E.C. nationality. The Council took the restrictive view in formulating Regulation 1612/68. Article 1 of the regulation limits the right to work in another Member State to "any national of a Member State" and the other articles on eligibility for employment follow suit.[38] The only possible exceptions are the first sub-paragraph of Article 3(1) and Article 3(2), which make no mention of such a limitation. However, it is probable that these latter provisions are meant to be interpreted in the light of the restrictive nature of the surrounding articles, and, in any case, they are of little assistance in view of the limitation in Article 1.

Although neither the Treaty nor the secondary legislation confer upon non-E.E.C. nationals the right to engage in paid employment in another Member State, they may nevertheless work abroad where their services are necessary to the realization of their E.E.C. employer's right to a livelihood. In these circumstances the right of the non-E.E.C. national derives solely from the abolition of restrictions on his employer. Thus it is not set out separately in the Treaty or the secondary legislation but instead is referred to very obliquely in connection with the employer's rights.

This limitation of the autonomous right to pursue a livelihood to E.E.C. nationals follows as a logical consequence from the similar limitation placed upon the rights of entry and residence.[40] It would be rather pointless to give foreign nationals a right to work or do business within the Community without according them the pre-conditional rights of entry and residence.

Domestic nationals. There is an apparent discrepancy in the treatment of domestic nationals under the Treaty, for, whereas they are covered by the provisions on paid employment,[41] the provision of services[42] and the setting up of a secondary establishment,[43] they do not seem to benefit from the right to set up a primary establishment in their own country.[44] In its interpretation of the Treaty provisions, however, the Court of Justice has applied a uniform criterion to determine whether they apply to domestic nationals.[45] Its view is that, provided they have severed their connection with their own country and thereby become assimilated to the position of non-nationals, domestic nationals may enjoy in their home state all the rights accorded by the Treaty, including the right to set up a primary establishment.[46] Conversely, where they have not so severed their connection, they are not protected by any of the Treaty provisions.

It is rare that domestic nationals will be refused the right to enter and reside in their own country,[47] but they will be barred from employment or self-employed activity as a matter of course where they cannot conform to national laws. This is what happened in Knoors (115/78), where a Dutchman was refused an authorisation to set up a contracting business in the Netherlands because he did not possess the requisite qualifications. Knoors, however, contested the denial of authorisation and claimed that he was entitled to have his six years as an independent contractor in Belgium accepted as the equivalent to the Dutch qualifications pursuant to Transitional Directive 64/427. Relying on the narrow wording of Article 52 of the Treaty, the Dutch authorities demurred, arguing that a domestic national wishing to set up a primary establishment in his own country was not covered by Community law. The matter ultimately came before the Court of Justice, which upheld Knoors' claim on the basis of the principle referred to in the preceeding paragraph; domestic nationals, it asserted, are always entitled to the protection of Community law where

> ...owing to the fact that they have lawfully resided in the territory of another member-State and have acquired a trade qualification which is recognized by the provisions of Community law, [they] are, with regard to their State of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty.[48]

The practice of the Council has always been to include domestic nationals as beneficiaries of all the Treaty provisions on personal mobility. They are included as beneficiaries in Title I of the general programmes,[49] and the directives mostly follow suit, either by incorporating Title I[50] or, particularly since direct applicability, through specific wording to this effect.[51] The inclusion of domestic nationals is especially important with respect to the harmonising provisions of the secondary legislation, for, otherwise, they would not be able to exercise fully the rights that have been held to accrue to them under the Treaty.

FOOTNOTES

Chapter 3D

[1] Article 58 provides that companies and firms "shall be treated in the same way as natural persons who are nationals of Member States."

[2] See Article 1 of Directives 64/224, 65/1 and 69/82.

[3] Article 1 of Directives 67/530, 67/531, 67/532, 68/192 and 68/145.

[4] Article 1 of both directives.

[5] Title 1 of the General Programme on establishment stipulates that "the persons entitled to benefit from the abolition of restrictions on freedom of establishment...are...nationals of Member States...and companies or firms...." (Emphasis added). Title I of the General Programme on services is couched in analogous language.

[6] Article 1 (emphasis added).

[7] However, Article 58, from which this right derives, does not in all probability give them a directly effective right to corporate recognition, without which the right to do business is incapable of exercise - see Chapter 2C, pp. 121-124 and infra, p. 284.

[8] Cf. Article 89(1)(a) of Directives 73/239 and 79/267, which stipulates that only companies may carry on the business of direct insurance within the Community.

[9] The health care directives on mutual recognition apply primarily to persons whose training satisfies the terms of the appropriate coordination directive, and the coordination directives apply only to natural persons - see Co. Dirs. 75/363, art. 1, 6; 77/453, art. 1, 3; 78/687, art. 1, 7; 78/1027, arts. 1, 2; 80/155, arts. 1, 5. The directive on the provision of legal services likewise applies to natural persons - see Co. Dir. 77/243, art. 1(2).

[10] An Anglo-Irish partnership must obtain recognition of its right to sue and be sued.

[11] Chapter 2D deals with this exception, which is based on Articles 48(3) and 56 of the Treaty.

[12] Directive 64/221.

[13] See the discussion in Chapter 2D, pp. 140-141.

[14] See van Duyn (41/74).

[15] See fn. 7.

[16] It should be noted that at present corporate recognition is determined according to national law - see Chapter 2C, pp. 123-124 and infra, p. 284.

[17] See Chapter 2A, pp. 71-81, 2B pp. 107-109, and 2C, pp. 129-131.

[18] See Chapter 2A, pp. 74-75, and 2B, p. 108 where it is suggested that a general right to work for a domestic employer in another Member State can be derived from Article 48(1) of the Treaty.

[19] See Chapter 2A, p. 76 and 2B, p. 109.

[20] See Chapter 2A, p. 78 where it is mooted that it may be sufficient that the provider be established in a Member State other than the one where he is performing the services.

[21] See Chapter 2C, p. 129.

[22] See Co. Dirs. 65/1, art. 3(2); 64/654, art. 4(2). But see the discussion in Chapter 2A, p. 78 where it is asserted that this confinement is ultra vires Article 59 of the Treaty, which only requires that the recipient of the services be a resident of a Member State other than the one where the provider is established.

[23] This is especially true of Article 1(1) of Regulation 1612/68, which applies to "any national of a Member State."

[24] See the discussion in Chapter 3B, pp. 232-233 and p. 234.

[25] See the discussion in Chapter 2A, p. 83.

[26] See the discussion in Chapter 2C, pp. 121-125.

[27] Ibid.

[28] The Convention on Mutual Recognition of Companies provides in Article 3 that companies that have their central administration outside the Community may be required to show an existing establishment in a Member State in order to obtain recognition. This would effectively extend the prerequisite of establishment to the setting up of a primary establishment as well - see Chapter 2C, pp. 132-133.

[29] See Co. Dirs. 65/1, art. 3(2); 67/654, art. 4(2) (emphasis added). This wording reflects the intent of Article 59, which requires that the provider be established in a Member State "other than that of the person for whom the services are intended."

[30] Article 52, para. 1.

[31] But see the discussion in Chapter 2C, p. 131 on the additional requirement in the Convention that a company have its registered office in the Community.

[32] Title I of the general programmes.

[33] *See* Chapter 2C, fn. 13.

[34] This term is found, *inter alia*, in Co. Dirs. 65/1, art. 3(2); 67/654, art. 4(2).

[35] *See* Article 1 of Directives 65/1, 68/365, and 64/429.

[36] *See* Article 1 of Directives 63/261, 67/530, 67/531, 67/532, 68/192, and 68/145. Articles 2, 4 and 6 of Directive 75/362, refer, as do all the directives on mutual recognition of health care qualifications, to qualifications "awarded to nationals of Member States."

[37] Emphasis added.

[38] *See* Article 6, which proscribes the use of discriminatory criteria in "the engagement and recruitment of *a national of one Member State* for a post in another Member State" (emphasis added).

[39] *See* Article 54(3)(f) of the Treaty and Title IIIA, para. 4 of the General Programme on establishment. The General Programme on services only refers to the right of non-E.E.C. personnel in connection with their right of entry in Title II. On no occasion is there an explicit reference to *non*-E.E.C. nationals, but these provisions have no relevance for E.E.C. nationals - *see* Chapter 3B, fnn. 193 and 194.

[40] *See* Chapter 2A, pp. 81-82 and Chapter 2B, p. 109.

[41] Article 48 applies generally to workers of the Member States.

[42] Article 59 applies generally to nationals of Member States.

[43] Article 52, para. 1, 2nd sentence applies to nationals of *any* Member State.

[44] Article 52, para. 1, 2nd sentence only applies to nationals of one Member State wishing to establish themselves in *another* Member State.

[45] *See* Knoors (115/78), which is discussed in Chapter 1, pp. 32-34 and *infra*. In *Auer* (136/78) the Court of Justice seems to uphold the exclusion of domestic nationals, but it is suggested that *Knoors* (115/78) more accurately expresses the Court's attitude - *see* Chapter 1, pp. 32-34.

[46] *Knoors*, 115/78, [1979] 2 C.M.L.R. 357 at 367.

[47] It can happen - *see* *Saunders* (175/78).

[48] *Knoors*, 115/78 [1979] 2 C.M.L.R. 357 at 367.

[49] Title I refers to "nationals of the Member States" without restriction.

[50] *See* Article 1 of Directives 65/1, 68/365, and 64/429.

[51] *See* Co. Dirs. 75/362, arts. 2, 4, 6; 77/429, art. 1(2); 80/155, art. 1.

Chapter 3E

THE EXCEPTION OF PUBLIC SERVICE AND OFFICIAL AUTHORITY

THE SUBSTANCE OF THE EXCEPTION

Introduction

The grounds upon which this exception may be used against non-nationals are not uniform. In the case of self-employed persons Article 55 of the Treaty states that the protection of the Treaty may be withheld from persons whose activities "are connected, even occasionally, with the exercise of official authority." In addition the Council is given the power under the second paragraph of Article 55 to extend the application of the exception to other activities. Article 48(4) is worded more broadly to include all paid employment in the public service but gives no discretionary authority to the Council to extend the exception. With the exception of the Council's role under the second paragraph of Article 55, and subject to the control of the Court of Justice, it is up to the Member States to decide when and how to apply the exception.

The Definition of a Connection with the Exercise of Official Authority

Article 55 of the Treaty permits the use of the exception where the self-employed activity of a non-national has only an occasional connection with the exercise of official authority. This formulation raises two questions, namely whether a whole activity may be barred to non-nationals where its pursuit involves an *optional* connection with official authority, and secondly, whether mere contact with a person exercising official authority is sufficient to establish the necessary connection.

Both these questions were raised in Reyners (2/74), a case that concerned a Dutchman who was denied access to the Belgian legal profession, inter alia, on the basis of Article 55. All the Member States that made submissions to the Court of Justice agreed that the use of the exception was only justified if the activities of a lawyer in Belgium necessarily involved a connection with the exercise of official authority. The Irish, British and Dutch governments also took the view that there was no such necessary connection at issue, but Belgium, supported by Germany, maintained that it was provided by the lawyer's inevitable contact with the judicial process.

In its judgment the Court of Justice strongly supported the unanimous opinion of the Member States making submissions that exclusion of non-nationals from a whole activity is only warranted where a connection with the exercise of official authority is an integral part of that activity. Referring specifically to the legal profession the Court asserted that the connection must be "linked with that profession in such a way that freedom of establishment would result in imposing on the member-State concerned the obligation to allow the exercise, even occasionally, by non-nationals of functions appertaining to official authority."[1] The Court then went on to reject the Belgian and German contention that mere contact with the judicial process, which it accepted as an integral part of the legal profession in Belgium, constituted the requisite connection:

> Professional activities involving contacts, even regular and organic, with the courts, including even compulsory cooperation in their functioning, do not constitute, as such, connection with the exercise of official authority.[2]

As a result of these deliberations the Court concluded that the exception of official authority could not be used to deny access to the

Belgian bar in the case of Mr. Reyners, for, once contact with the courts was ruled out as a connection with the exercise of official authority, there was no other integral part of the legal profession in Belgium that came within the exception:

> The most typical activities of the profession of avocat, in particular, such as consultation and legal assistance, and also representation and the defence of parties in court, even when the intervention or assistance of the avocat is compulsory or a legal monopoly, cannot be considered as connected with the exercise of official authority.[3]

Reyners (2/74) thus answers the two questions raised by the wording of Article 55 in the negative. It makes it very clear that a whole area of endeavour is not to be judged by the nature of certain optional activities within it and that a connection with official authority requires that a non-national actually exercise the authority himself.

The Definition of Official Authority

The Court of Justice does not give any comprehensive definition in Reyners (2/74) of the concept of "official authority," telling us only that judicial power comes within the concept but that the normal duties of a lawyer do not. This is unfortunate, particularly as the Commission and Advocate-General Mayras gave the Court ample reason to pronounce more broadly on the issue by setting forth their own definitions. The Commission suggested that it referred to "prerogatives outside the general law,"[4] while the Advocate-General invoked in grand Hegelian manner "the sovereignty and majesty of the State."[5] The prerogatives that exist outside the general law are the executive, legislative and judicial powers of the state to affect the rights of citizens, and this is indeed surely what is meant by "official authority." As Smit and Herzog put it:

> In essence, the question seems to be whether a person is vested with sovereign power and acts in that capacity.[6]

Using this definition Smit and Herzog include among the activities to be barred to non-nationals those of notaries public and process servers in France and Belgium, where they both act as an arm of the executive.[7] On the other hand, they would exclude chartered accountants, whose reports remain private documents even if they are prepared pursuant to a statutory obligation.[8] In Haug (U.K.) the Comptroller of the Patent Office rejected the use of the exception in the case of patent agents, pointing out that "any official authority in relation to patents is exercised by the Courts and various Government Departments."[9] Likewise, the Commission in its Opinion of September 25th, 1980 criticised the Dutch contention that deep-sea pilots come within the exception on the ground that they do not take over the official authority exercised by the captains of ships but merely perform a technical function.[10] The criterion common to all these examples is whether or not the activity involves an executive, legislative or judicial act. Where it does, the exception applies; where it does not, Article 55 can have no application.

The Council's Authority Under Article 55, Paragraph Two

The second paragraph of Article 55 gives the Council an ill-defined authority to extend the use of the exception based on the exercise of official authority. Wyatt and Dashwood believe that this authority is limited to finding that a connection exists as a matter of fact between an activity and the exercise of official authority, and that it is still up to the courts to decide whether, as a matter of law, the exception applies in the case at bar.[11] While it is clear that the Council can only extend the exemption to activities that are connected with official authority,[12] Wyatt and Dashwood seem to go further than is justified by the wording of the paragraph, which states quite broadly that "[t]he Council may...rule that the provisions of this Chapter shall not apply to certain activities." A more liberal and, it is suggested, accurate interpretation of the authority conferred by these words is that it is intended to complement the strict limits placed upon the use of the exception by the first paragraph of Article 55 by permitting the Council to declare that certain activities shall be deemed _as a matter of law_ to be connected with the exercise of official authority and, as such, to fall within the exception. This is certainly what the Council appears to have done on the one occasion that it has used its authority under Article 55(2);

> Activities connected with the exercise of official authority in a Member State shall, in the Member States in question, be excluded from the provisions of this directive. These activities are as follows:
>
> _in France_:
> the sale by auction of goods and other articles of moveable property by _officers publics_ or _officers ministeriels_;
>
> _in Italy_:
> the sale by auction of goods by _mediatori_ in the exercise of their official duties;
>
> _in Germany, Belgium, Luxembourg and the Netherlands_:
> participation by court bailiffs and notaries in auction sales;
>
> _in the United Kingdom_:
> the sale of goods in execution of a court order (1) in England and Wales by sheriffs, under-sheriffs, or sheriffs' officers or (b) in Scotland by messengers-at-arms, sheriffs' officers or any person authorized by a sheriff to act as such;
>
> _in Ireland_:
> the sale of goods in execution of a court order by sheriffs, under-sheriffs or court messengers;
>
> _in Denmark_:
> the sale by auction of goods by auctioneers.[13]

The Ambit of Article 48(4)

The exception contained in Article 48(4) is much broader in scope than its equivalent in Article 55, for it covers all employment in the public service regardless of whether the exercise of official authority is involved or not. In France and Germany, for example, it has been used to exclude non-nationals from the teaching profession. Nevertheless it has often been suggested that the exception for employees should be brought into line with that for self-employed persons.[14] There is much to be said for this suggestion, which has not as yet been taken up by the Court of Justice, for there is no reason to treat employees more harshly than self-employed persons. The mere fact that the government rather than a private individual is the employer does not justify an interference with the right to pursue a livelihood.

A word of caution is, however, in order. It is important to note the essential balance that is struck in Article 55 between the limitation of the use of the exception to activities involving the exercise of official authority contained in the first paragraph, and the discretionary power given to the Council to expand the application of the exception contained in the second paragraph. Article 48(4) would lack this balance, were it to be given a restrictive interpretation. As a result the Member States would be left with a provision identical in scope to the first paragraph of Article 55 without the possibility for corrective measures by the Council. Such a situation could well lead to a tacit agreement among the Member States not to observe the Treaty on this point, and this is not the sort of precedent that should be encouraged.

THE SCOPE OF THE EXCEPTION

The Treaty states very broadly that the provisions on personal mobility do not apply to employment in the public service[15] or to self-employed activities that are connected with the exercise of official authority.[16] This formulation suggests that all areas of freedom of movement are covered by the exceptions, but this is not so. Their very nature must confine their application to the realm of employment, and the Court of Justice has restricted them further to the right to pursue a livelihood in its decision in the _Sotgiu_ case (152/73).

Sotgiu (152/73) concerned an Italian who worked for the German post office and was paid a lower separation allowance than that available for nationals. He complained that this constituted a discriminatory condition of employment in contravention of Article 7 of Regulation 1612/68. The German postal authorities rejected the complaint, _inter alia_, on the ground that the regulation was not applicable to conditions of employment in the public service, which was totally exempted from the provisions of Community law by virtue of Article 48(4). The matter came before the Federal Labour Court, which referred the issue to the Court of Justice.

In its reply to the reference the Court of Justice rejected the standpoint of the German postal authorities, holding that Article 48(4) only applies to access to public service positions; it cannot be used to deprive a non-national of the right to equal treatment in the work place once he has been appointed.[17] Although this decision was based on an interpretation of Article 48(4), the same principle must also hold true for Article 55, which on this point is couched in language of similar scope to that of Article 48(4).[18]

It is not clear what the position is with respect to promotions within the public service.[19] On the one hand it could be argued that the denial of promotion infringes the non-national's right to equal treatment once he has been appointed and, as such, is prohibited by the Court of Justice in Sotgiu (152/73). On the other hand it can be maintained that the refusal to promote a non-national to another position arises from the fact that he has no right of access to that position. It is submitted that this second viewpoint is the more acceptable, for all a non-national has a right to expect according to the Court of Justice in Sotgiu (152/73) is that he be treated equally in the position that he actually holds. Moreover, to hold otherwise would be to invite the Member States to refuse non-nationals access to even the most lowly positions in the public service for fear of being obliged to promote them to sensitive positions that they wish to reserve for nationals.

Although the exceptions contained in Articles 48(4) and 55 have no direct relevance to the rights of entry and residence, their use can indirectly affect their exercise. A non-national's right of residence is premised on actual employment or self-employment, so that, if he is barred from a certain position or activity, he may be unable to obtain the right. The exceptions are less likely to affect the right of entry, which is based on a subjective desire to work. Nevertheless, if a non-national were to evince the desire to do something that clearly falls within the exceptions, such as become a judge, the immigration authorities would presumably be entitled to refuse him entry.[20]

FOOTNOTES

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[1] [1974] 2 C.M.L.R. 305 at 329.

[2] Ibid.

[3] Ibid.

[4] [1974] E.C.R. 631 at 640.

[5] [1974] 2 C.M.L.R. 305 at 318.

[6] Hans Smit and Peter Herzog, The Law of the European Economic Community (New York: Matthew Bender, 1976-1982), II, p. 2-605.

[7] Smit and Herzog, op. cit., II, p. 2-608.

[8] Ibid.

[9] [1976] 1 C.M.L.R. 491 at 493.

[10] 1980 O.J. L. 257, p. 33.

[11] Derrick Wyatt and Alan Dashwood, The Substantive Law of the EEC (London: Sweet and Maxwell, 1980), p. 192.

[12] See Smit and Herzog, op. cit., II, p. 2-605.

[13] Co. Dir. 68/363, art. 4.

[14] Andrew Durand, "European Citizenship," (1978) 4 European Law Review, 1 at 12; Jean-Claude Séché, "Free Movement of Workers Under Community Law," 91977) 14 C.M.L.Rev., 385 at 393.

[15] Article 48(4).

[16] Article 55, para. 1.

[17] [1974] E.C.R. 153 at 162-163.

[18] Article 48(4) refers simply to "employment" while Article 55 refers to "activities."

[19] The problem of promotions does not occur for the self-employed as they have no employer to promote them.

[20] It is a moot point, however, whether immigration officers should be given the authority to enforce the exceptions - see Chapter 2A, p. 75.

CHAPTER FOUR

THE RIGHT TO EQUAL TREATMENT

CHAPTER FOUR

THE RIGHT TO EQUAL TREATMENT

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Chapter 4A

INTRODUCTION

The Legislation

The List of Applicable Legislation

Treaty Provisions

Articles 7, 48, 49, 51, 52, 54, 58, 59, 60, 63, 66, 220

General Programmes

General Programme for the abolition of restrictions on freedom of establishment, issued pursuant to Article 54(1).

General Programme for the abolition of restrictions on freedom to provide services, issued pursuant to Article 63(1).

Secondary Legislation

(a) Employees

Council Regulation (EEC) 1612/68 issued pursuant to Article 49

Council Directive 68/360/EEC,issued pursuant to Article 49

Commission Regulation (EE) 1251/70, issued pursuant to Article 48(3)(d)

Council Directive 77/486/EEC, issued pursuant to Article 49

(b) Self-Employed Persons

(i) General legislation

Council Directive 73/148/EEC, issued pursuant to Articles 54(2) and 63(2).

Council Directive 75/34/EEC, issued pursuant to Article 235

(ii) Particular activities (Directives marked with asterisk also apply to employees)

Agriculture and horticulture: Council Directives 63/261, 63/262, 65/1, 67/530, 67/531, 67/532, 68/192, 68/415, 71/18.

Catering industry: Council Directive 63/367.

Coal trade: Council Directive 70/522.

Film industry: Council Directives 63/607, 65/264, 68/369, 70/451.

Financial institutions: Council Directives 73/183, 77/780.

Food manufacturing and beverage industry: Council Directive 68/365.

Forestry and logging: Council Directive 67/654.

Health Care professions: Council Directives 75/362*,[1] 77/452*, 78/686*, 78/1026*, 80/154*.

Insurance industry: Council directives 64/225, 73/229, 73/240, 79/267.

Manufacturing and processing: Council Directive 64/429.

Mining, quarrying, prospecting and drilling: Council Directives 64/428, 69/82.

Miscellaneous activities: Council Directives 63/340.

Public utilities: Council Directive 66/162.

Public works: Council Directives 71/304, 71/305.[2]

Real estate and other business activities: Council Directive 67/43.

Toxic products: Council Directive 74/557.

Wholesale and retail trade: Council Directives 64/223, 64/224, 68/363.

All these directives are summarized in the Appendix.

(c) Employed and Self-Employed Persons

Council Regulation 1408/71/EEC, as amended by Council Regulation 1390/81/EEC[3], issued pursuant to Articles 2, 7, 51 and 235.[4]

Council Regulation 574/72/EEC, as amended by Council Regulation 3795/81/EEC,[5] issued pursuant to Articles 2, 7, 51, and 235.[6]

Council Directive 80/1263/EEC, issued pursuant to Article 75(1)(c).

General Introduction

Prior to the end of the transitional period the right to equal treatment for non-nationals derived exclusively from the secondary legislation of the Community and from the national measures enacted pursuant to it, while the Treaty constituted merely the source of authority for these provisions.[7] As far as equality in the work place was concerned, this was regulated by the same legislation that granted the right to pursue a livelihood with the result that the same system operated for equality as for livelihood.[8] The right of employees to equal conditions of employment was thus established on a uniform basis by directly applicable Regulation 1612/68, while the right of the self-employed to pursue their activities on an equal footing with nationals was formulated in principle in the general programmes and then brought into effect by directives issued in accordance with and by reference to these programmes, which thus retained an importance in this area that they did not have in relation to the rights of entry and residence.[9]

The right to equal treatment under the Treaty, as it has been interpreted by the Council and the Court of Justice, does not, however, stop at the work place, and other legislation in the form of directives and regulations was issued with respect to family rights, social, fiscal and housing rights and the right to remain in the host state after the cessation of employment. Most of this additional legislation only affected employees, as self-employed persons were restricted to the directives referred to above with the exception of some provisions on family rights.

The Position Prior to the End of the Transitional Period

Employees. The major pieces of equalising legislation during the transitional period for non-national employees were Regulation 1612/68 on equality in employment, housing and family rights, Regulation 1251/70 on the right to remain in the host state after having been employed there, and Regulation 1408/71 on social security. Family rights also crop up in Directive 68/360, which gives family members a right of entry and residence, and in Regulation 1251/70, which gives them a right to remain permanently in the host state with the worker if he should decide to exercise this option for himself.[10]

The content of this legislation will be discussed in detail in succeeding parts of this chapter, and so it will suffice at this stage to make some general observations on it. The first point to be made is that, despite the reference in the Preamble to Regulation 1612/68 to the need to ensure equality of treatment for non-nationals so as to bring about their integration into the host country, the equalising legislation, even taken as a whole, did not in any way provide a comprehensive right to equality in all matters that pertain to such integration. It dealt instead only with specific aspects of the right to equality, and, even here, the wording of the provisions is sometimes unnecessarily restrictive. This is particularly the case in the area of family rights. It would seem, for example, from the language of Article 7(2) of Regulation 1612/68 that family members have no equal right to social and fiscal benefits,[11] while Article 12 of the same regulation limits access to the educational facilities of the host state to children of the non-national employee.[12] There are also problems concerning the right of non-E.E.C. family members to take up employment[13] and, perhaps most important of all, there are ambiguities and limitations surrounding the definition of the beneficiaries of family rights.[14] There are less problems with the specific rights accorded the employee himself except that the wording of the legislation would appear to confine his right to social and fiscal benefits to those that flow directly from his contract of employment.[15]

Self-employed persons. With the exception of Directive 73/148, which gives all self-employed persons the right to be accompanied by their family to the host state, and Article 11 of Regulation 1612/68, which gives the non-E.E.C. spouse and children of self-employed non-nationals the right to take up paid employment, the only equalising legislation that applied to non-national self-employed persons during the transitional period was contained in the directives on the liberalisation of specific activities. To the extent that this meant that equal treatment only became available on a piecemeal basis as a directive was issued on a particular activity,[16] no disadvantage was normally entailed. If a non-national was not yet allowed to pursue his activity in another Member State, he could not install himself there and hence would have no call for equal treatment. Only on rare occasions was there a lapse in time between the granting of the right to pursue an activity and that of the right to do so in conditions of equality with nationals. Directive 64/429, for example, established the right of non-nationals to engage in manufacturing and processing activities, but equal access to public works contracts for the non-national involved in construction was not accorded until seven years later when Directive 71/304 was issued.[17]

The real disadvantage incurred by self-employed persons in having to rely almost exclusively on the liberalisation directives for their right to equal treatment during the transitional period results from the limited scope of the equalising provisions in these directives. For, although nearly all the directives incorporate Title III of the general programmes,[18] which sets out a general prohibition on all discriminatory measures that might hinder non-nationals in their pursuit of an activity,[19] it would seem nonetheless that the protection they afforded relates only to the conditions of doing business. Title III does, it is true, include the denial of the right to participate in the social security scheme of the host state as a specific illustration of a prohibited discriminatory measure,[20] and this provision, together with the broad language of the general prohibition, could be taken to infer that Title III aims at a comprehensive right to equality covering all aspects of life in the host state. On the other hand, all the other illustrations of discrimination that are given in Title III such as limiting access to sources of supply or distribution outlets,[21] making the pursuit of an activity more costly by taxation and other financial burdens[22] and granting less favourable treatment in the event of a state takeover of the business,[23] are concerned with equality in the work place, and it is probable that social security rights were mentioned because they will normally accrue as a result of being self-employed. The directives themselves support a restrictive view of the import of Title III, for they include no matter unrelated to employment in the additional specific provisions that they contain. These provisions invariably deal with the right to financial help for carrying on a business,[24] the prohibition of aids by a Member State to its own nationals that will distort the conditions of their establishment in another Member State,[25] the right to membership of trade and professional associations,[26] or the right to enjoy specific taxation allowances and authorisations.[27]

In all probability, therefore, self-employed non-nationals not only did not possess a comprehensive right to equality in the host state during the transitional period, they also did not enjoy equal social and housing benefits beyond the right to join the host state's social security scheme or family rights beyond those of entry and residence accorded by Directive 73/148 and that of employment for certain non-E.E.C. family members granted by Article 11 of Regulation 1612/68. They certainly did not have any right to special social security arrangements or to remain in the host state after terminating their working life, as the secondary legislation required by the Treaty to create these rights[28] did not apply to self-employed persons during the transitional period. Only in matters affecting their business were the self-employed definitely and adequately protected.

The secondary legislation and the Court of Justice. Although the secondary legislation was paramount during the transitional period, it was still subject to the control of the Court of Justice, whose task it is under the Treaty to interpret the secondary legislation of the Community institutions and to ensure its consistency with the Treaty.[29] Both before and after the transitional period the Court has exercised this jurisdiction to safeguard and, wherever possible, to extend the rights of persons covered by the Treaty. It has done this in three ways; by striking down Community provisions that restrict personal rights in contravention of the Treaty, by upholding secondary legislation that appears to go beyond the narrow confines of the Treaty, and by giving the widest possible interpretation to specific provisions of Community law. The Court's jurisprudence in this area has been discussed before,[30] but it deserves a special mention in the context of the right to equality because of the crucial role it has played.

The Court has used its power to strike down inconsistent secondary legislation most frequently in the case of the Council's social security legislation, some provisions of which purport to allow Member States to curtail rights obtainable under national law.[31] A good example of the Court's approach is Ciechelski (1/67). In that case a worker had contributed

21 periods of insurance under German law and 113 under French law towards an old-age pension. Upon his retirement he should have been entitled under French law, which set 120 periods as the maximum number of required contributions, to 113/120ths of the full pension, but the French government instead used the aggregation and apportionment provisions of Regulation 3 on social security[32] in order to include the German contributions in its calculation of the payable benefit. Accordingly, it paid to the worker only 113/134ths of the full pension. The Court of Justice rejected the French government's calculation on the basis that it was contrary to the Treaty provisions on personal mobility that a regulation based on Article 51 should operate in such a way as to reduce the amount of a benefit payable under national law.[33] In the Court's view, Article 51 existed to extend the rights of migrant workers and not to take away rights that they already possessed. The Court took a similar view in such cases as Moebs (92/63), Kalsbeek (100/63) and de Moor (2/67) and has used the same approach since direct applicability in Manzoni (112/76), Petroni (24/76), Gravina (807/79) and others. Although the Court's nullifying power is not restricted to the Community's equalising legislation, it has been used to greatest effect in this area in order to prevent the legislation from becoming counter-productive.

While the Ciechelski line of cases aims at safeguarding a person's rights at national law, the Court's acceptance of secondary legislation that goes beyond the confines of the Treaty has safeguarded Community rights, including the right to equality. Especially important for this latter right is the Court's approval of the provisions on family, social and housing rights for employees despite Article 48(2), which could be construed as restricting the right to equality to conditions of employment.[34] In addition the right to equality has been extended in scope, as have all the other personal mobility rights, by the Court's inclusion as beneficiaries of domestic nationals who have severed their connection with their home country[35] and by its insistence that the Treaty prohibits discrimination in fact as well as in law.[36] The Court also has upheld the application of the social security legislation to situations that do not really come within the purview of the Treaty concept of personal mobility. The possibility for such an application arises because any E.E.C. national who is insured under the social security scheme of a Member State is covered by the legislation[37] and because some benefits are made available to persons who have no work connection to the Member State where they are obtained.[38] Thus, in van Dijk (33/64), the insurance company of a Dutch national who was working in Germany but who was involved in an accident in the Netherlands was able to rely on the subrogation provisions of Regulation 3[39] despite the fact that its client had no work connection to the Netherlands. But at least in this case the person concerned was a migrant worker so that it could be argued that the operation of the provision was in keeping with Article 51, which authorises special social security arrangements for migrant workers. In Maison Singer (44/65), however, the Court went even further and permitted the use of the subrogation provision in the case of a German tourist who was killed in France and who had never worked anywhere but Germany, thus upholding not only the availability of benefits regardless of a work connection but also the right to such benefits of all persons insured under the social security scheme of a Member State even where they are not migrant workers. It should be noted, however, that although decisions such as these are relevant to the right to equality in as much as they confer rights on persons that are normally restricted to those people covered by the law of the Member State where the risk materialises, they do not affect the right to equal treatment of a non-national in a host state. Indeed the peculiarity of these cases is that they are concerned with persons who are not migrant workers and with benefits that arise outside the host state.

While the safeguarding of existing national and Community rights by the Court of Justice has doubtless contributed much to improve the lot of migrant workers within the Community, its extension of their right to equality by a very liberal interpretation of the secondary legislation is perhaps even more significant. This aspect of the Court's jurisprudence has already been discussed in Chapter 1 with specific mention of its decisions in *Michel S* (76/72) and *Fiorini* (32/75).[40] With respect to the latter case, it should be noted that, in addition to extending the protection against discrimination afforded by Article 7(2) of Regulation 1612/68 to cover a social benefit unconnected with the worker's contract of employment, the Court also included the members of his family as beneficiaries of the benefit. This represents a further extension of the strict language of the article, for it means that the Court was interpreting Article 7(2) as applying not only to benefits unconnected with the contract of employment but also to benefits that accrue to family members independently of the worker. In other words what is set out in Regulation 1612/68 as a worker's benefit becomes in the Court's hands a family benefit. The full import of the *Fiorini* decision (32/75) does not seem to have been realized,[41] probably due to Advocate-General Trabucchi's statement to the Court that the fare reduction on the French railways, which was the social benefit at issue in the case, could still be considered a benefit for the worker even when applied to his family on the basis that it represented an alleviation of his family financial responsibilities.[42] However, if Trabucchi's view had formed the rationale for the Court's extension of the benefit to family members under Article 7(2), it would not explain why the Court was prepared to accord the fare reduction to them even after the worker's death when he no longer had any family responsibilities that could be alleviated. In fact the Court based this aspect of its decision on Article 7 of Regulation 1251/70, which grants family members remaining in the host state after their principal's death the continuing protection of the equalising provisions of Regulation 1612/68,[43] and this rationale would only make sense if Regulation 1612/68 was interpreted as giving them a personal right to the benefits mentioned in Article 7(2). Final confirmation that the Court did intend in Fiorini (32/75) to include independent family benefits under Article 7(2) is provided by its decision in Inzirillo (63/76), where it advanced the article as an alternative ground for according a special grant to the handicapped adult son of an Italian worker in France.[44] Certainly that benefit could not be considered an alleviation of the worker's responsibilities.

There are many other examples of this type of extension of equality rights by the Court of Justice. In Casagrande (9/74), for example, it interpreted Article 12 of Regulation 1612/68 on education rights as including an equal right to educational grants as well as to access to the facilities themselves. This case thus follows in the footsteps of Michel S (76/72), where the Court had applied Article 12 to grants for handicapped persons. Other illustrations of the Court's approach are best given from its decisions on the Community social security legislation, to which the Court has constantly given the widest possible interpretation. If we look at its treatment of the grant for handicapped persons of the type at issue in Inzirillo (63/76) and Michel S (76/72), we see that it has assimilated them to invalidity benefits by a generous interpretation of the term "benefits" in Article 1 (t) of Regulation 1408/71.[45] In keeping with its decision in Fiorini (32/75) it has also made them available to family members by subordinating Article 1(f) of Regulation 1408/71, which suggests that social security benefits are only available to such persons when the national legislation expressly so provides, to Article 2(1), which the Court has construed as giving them an autonomous right to benefits that come under the regulation. It did this in Mazzier (39/74) and Fracas (7/75), where the national legislation was silent on family rights, and in Inzirillo (63/76), where French law explicitly excluded the family member in question.[46]

This interpretive role of the Court has been particularly crucial in the area of equality because of the narrow scope of the secondary legislation and the restrictive nature of some of its language. The more significant decisions are those that were made prior to the end of the transitional period when this secondary legislation was the only source of the right to equality, but the Court has continued to give a wide interpretation to secondary law even after direct applicability[47] for reasons that will be mentioned in the following section.

The Position After the End of the Transitional Period

The development of a Treaty right to equality.

The effect of the declaration by the Court of Justice in its 1974 decisions[48] that the Treaty had become directly applicable and effective since the end of the transitional period was that henceforth the Treaty became the ultimate source of the right to equality. Since that time, therefore, it has been possible to rely directly on its provisions to make good the gaps and inadequacies in the secondary legislation, which, as in all other areas of personal mobility, was relegated to the subsidiary role of clarifying the rights bestowed by the Treaty. The effectiveness of the Treaty as a guarantee of equality was, however, attenuated by two important factors, namely, the complex nature of some of the unequal treatment and the deficiencies in the Treaty itself.

In discussing the relationship between the Treaty and the secondary legislation after the end of the transitional period in Chapter 1, it was pointed out that some discriminatory practices are too complex to admit of a resolution by judicial *fiat* on the basis of the Treaty alone.[49] Instead it is necessary to remove the discrimination by detailed secondary legislation, which retains an autonomous force despite the direct applicability of the Treaty by virtue of its indispensability. Such autonomous secondary provisions are most frequently required in the area of equal treatment, where such vital matters as the right to special social security arrangements, the problem of double taxation, and the right to remain in the host state after the cessation of employment need specific implementing legislation. By 1974 the necessary legislation had been issued with respect to social security arrangements and the right to remain but only in the case of employees. As far as the self-employed were concerned, there was no equivalent legislation and the Treaty did not even expressly provide for such measures. This meant that they were without any rights in these matters, for, although the Court may extend the scope of necessary implementing legislation by a broad interpretation of its provisions, it cannot make good the total absence of such legislation. However, in the years following direct applicability, these gaps were plugged by Directive 75/34 giving the self-employed the right to remain in the host state and by Regulation 1390/81 extending the social security arrangements to self-employed persons.[50] The problem of double taxation, on the other hand, has remained unresolved. No legislation has been issued on this matter pursuant to Article 220 of the Treaty, and even the draft directive proposed by the Commission in 1980 only deals with the double taxation of frontier workers.[51]

Even where a matter was capable of being resolved by direct recourse to the Treaty, it was not immediately clear following direct applicability whether the Treaty provisions were capable of providing an effective source of the right to equality. They appeared, after all, to restrict equality for employees to their conditions of work, and it offered the self-employed nothing beyond a guarantee against distortions caused by aids given by Member States to help the establishment of their own nationals and the right to use key non-E.E.C. personnel in other Member States. Certainly the Court of Justice seems to have been discouraged by the deficiencies in the Treaty, for it continued to interpret the secondary legislation in the widest possible way as a means of extending the right to equality.[52] But it would be incorrect to state that the Court ever despaired of using the Treaty as a direct source of this right,[53] for it had declared as far back as 1969 that Community law had to assure the principle of equal treatment[54] and had consistently supported the Council's disregard of the apparently narrow scope of the Treaty equality provisions during the transitional period.[55]

What the Court did following direct applicability was to follow a two-pronged approach. While using the secondary legislation in appropriate cases to solve a problem of equality on an ad hoc basis,[56] it developed at the same time an interpretation of the Treaty provisions that accorded with the inner logic of personal mobility. Using Article 7 as an interpretive guide, the Court took the view that as Articles 48 to 66 implement the general right to equal treatment set out in Article 7 in the area of personal mobility, they must reflect its comprehensive scope. In Walrave and Koch (36/74) it put the matter thus:

> Articles 7, 48, 59 have in common the prohibition in their respective areas of application, of any discrimination grounds of nationality.[57]

This view was repeated in Royer (48/75), where reference was again made in connection with Articles 48 to 66 to "the prohibition of all discrimination...on grounds of nationality."[58] Thus, on the basis of this reasoning, the Court was able to regard the specific instances of equality that are mentioned in the Treaty, such as the right to equality in employment in Article 48(2) and the prohibition on the use of aids for establishment in Article 54(3)(h), as merely illustrative of the general right to equality that, despite their unhelpful language, the Treaty provisions must be interpreted as bestowing. This reasoning is at the basis of the cases accepting the Council's legislation on equal rights, and it culminates in Choquet (16/78), where the requirement by a Member State that a non-national duplicate the driving test he had taken in his home country was held by the Court to be a possible infringement of the non-national's general right to equality under the Treaty.[59]

The two prongs of the Court's approach come together in Fracas (7/75). In that case the Court granted a right to non-derivative social security benefits to the son of a non-national worker, but, although it based its decision on a generous interpretation of Regulation 1408/71,[60] it justified its generosity by reference to the father's general right to equal treatment:

> Indeed, if this were not the case, a worker anxious to ensure to his son the lasting enjoyment of the benefits necessitated by his condition as a handicapped person, would be induced not

> to remain in the member-State where he has established himself and has found his employment, which would run counter to the object sought to be attained by the principle of free movement of workers within the Community.[61]

The Court used identical language in Inzirillo (63/76) to justify an interpretation of Article 1(f) of Regulation 1408/73 that virtually emasculated the article,[62] thereby underlining in dramatic fashion the fact that the Treaty does bestow a right to equality that is both general and available in the face of inadequate secondary legislation.

Harmonising legislation. As with the right to pursue a livelihood that flows from the Treaty, the right to equality contained in Article 48 to 66 is not effective against non-discriminatory national laws that nevertheless put non-nationals at a disadvantage.[63] This shortcoming is, however, less of a problem in the area of equality for two reasons. In the first place, most of the disadvantages accrue from laws that affect national and non-nationals in like manner, such as high taxation rates, inflation, inadequate or inferior medical facilities and strict labour laws, and which the non-national can hardly expect to have changed for his benefit. Secondly, where a national measure does put the non-national to a particular disadvantage, it is less likely to be susceptible of an objective justification that the Court will accept, for, while there may be good reason to protect the public interest before allowing a non-national to work in a given area, it is difficult to justify treating him differently once he is working.[64] And it is even more difficult to justify denying him benefits, for no reasonable public interest can require that non-nationals be treated as second-class citizens. For these reasons, therefore, the harmonising legislation of the Council has little relevance in the area of equality either before or after the transitional period. The one exception is

Directive 80/1263, which provides for the exchangeability of national driving licences. The most that can be said of the other harmonising provisions is that the coordination of national laws will indirectly affect the right to equality by establishing identical conditions for nationals and non-nationals.[65]

Directive 77/486. Directive 77/486 gives the children of non-national workers the right to free tuition to facilitate their initial reception into the host state and obliges Member States to promote the teaching of the mother tongue and culture of non-national children. Both these rights would appear to go beyond the scope of the Treaty,[66] which requires the elimination of discrimination against non-nationals but not any special treatment for them. Although it could be argued that the absence of these rights would result in discrimination in fact against non-national children, such an argument would open the door for all manner of demands on a host state, such as the provision of official services in foreign languages, special treatment for different religious groups, and even a vote. While such demands would be in order within a single state,[67] it must be remembered that the European Economic Community is a loose association of sovereign states, who have not yet ceded their authority in matters touching on political and civic rights. And the question of language, it is suggested, falls within this sovereign area, while the provision of free tuition involves an expenditure that goes beyond the mere negative obligation to eliminate discrimination that is contained in the Treaty.

The Authority for the Secondary Legislation

We are concerned here only with the social security legislation and Directives 77/486 and 80/1263, as the other legislation has been discussed in the preceeding chapters.

Regulations 1408/71 and 574/72[68] are based on Articles 51, 7 and 2 of the Treaty. Article 51 contains express authority for the Council to make special social security arrangements, and the possible significance of Article 7 has been mentioned in Chapter 1.[69] The use of Article 2, which emphasises the role of the Community in raising living standards and increasing stability, probably relates to arrangements for the unemployed. The major amendments to these two regulations, Regulations 1390/81 and 3795/81 respectively, also cite the same three articles but use in addition Article 235, which authorises the Council to take appropriate measures to attain a Community objective where the Treaty does not provide the necessary specific powers. This use of Article 235 is clearly intended to cover the failure of the Treaty to include an equivalent provision to Article 51 for the self-employed.

Directive 77/486 on the education of the children of migrant workers has regard to the whole Treaty but cites in particular Article 49. This fact, together with the reference in the title and Article 1 to the children of workers, means that the offspring of self-employed people do not enjoy the rights contained in the directive. This is a serious omission, as these rights do not flow directly from the Treaty, which cannot, therefore, make good the deficiency in the directive's scope. It is to be hoped that, as a practical matter, the children of the self-employed will be permitted access to the facilities set up under the directive.

No such problems are present in the case of Directive 80/1263, which is based on Article 75(1)(c) and applies to all holders of a national or Community driving licence issued by a Member State who acquire a right of residence in another Member State. This means that not only non-nationals but also non-E.E.C. nationals can benefit from its provisions for the automatic exchange of driving licences between the Member States. This is particularly important in the case of non-E.E.C. nationals who are sent to work in another Member State by their E.E.C. employer.

THE SUBSTANCE OF THE RIGHT

1. General Introduction

The right to equal treatment is not concerned with whether a person can live and work in another Member State, which has been the issue in the two preceding chapters, but with how these two basic rights are to be exercised. Equality of treatment has to do with the circumstances under which a non-national actually lives and works in the host state. As such, it is an essential part of personal mobility rights in the EEC for, although the rights of entry and residence and the right to pursue a livelihood are the pillars of this personal mobility, the right to equal treatment qualifies as the cement that holds them up.[70] In order for freedom of movement to have value, it must be exercisable in freedom and dignity and this, as the Council recognises in the Preamble to Regulation 1612/68, "requires that equality of treatment shall be insured in fact and in law...."[71]

But if equal treatment is the necessary complement to the basic rights that make up personal mobility, it must also go beyond the specific confines of these rights to be effective. Discrimination that affects any aspect of the life of non-nationals in the host state can act as a disincentive to movement, and what is needed to remove such disincentives is nothing less than the complete integration of the non-national and his family into the life and society of their new country.[72] The Court of Justice has recognised this in evolving its interpretation of the right to equality enshrined in Articles 48 to 66 of the Treaty,[73] and the Council refers to the need for integration in the Preamble to Regulation 1612/68.[74]

The scope of the right to equal treatment is thus as limitless as the fecundity of human imagination in setting up barriers against non-nationals. In the succeeding parts of this chapter some of the more frequent and effective of these barriers, which have called for a specific legislative response, are discussed. As with the right to a livelihood, the right to equality includes the prohibition of both differentiation between the like - discrimination in law - and the failure to differentiate between the unlike - discrimination in fact. Both types of discrimination are expressly proscribed in the secondary legislation[75] and by the Treaty as it has been interpreted by the Court of Justice.[76]

Discrimination in Law

Although the Court of Justice takes the view that the right of a non-national to equal treatment under the Treaty precludes "any discrimination on the grounds of nationality,"[77] it has nevertheless permitted Member States to attach Community and national formalities to the exercise by non-nationals of their rights of entry[78] and residence[79] and their right to pursue a livelihood.[80] Such formalities could be seen as violating the principle of equal treatment, but the rationale for tolerating them is that either they are necessary to ensure the proper operation of the Treaty, as in the case of Community formalities, or that they are only allowed where the exercise of the Treaty right in question is not made dependent upon their fulfilment, which is the rule laid down by the Court for national formalities.[81] In neither case is the free movement of the non-national imperilled, and so there can arise no inequality of treatment under the Treaty, which is concerned only with the rights necessary to attain full economic personal mobility.

Discrimination in Fact

The Court of Justice has made it very clear that, as with all the other Treaty rights and in particular the right to pursue a livelihood, the right to equal treatment requires the abolition of discrimination in fact as well as in law. In Sotgiu (152/73), a case dealing with equal conditions of employment, it stated this principle with unmistakeable clarity:

> The rules regarding equality of treatment, both in the Treaty and in Article 7 of Regulation No. 1612/68, forbid not only overt discrimination by reason of nationality, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.[82]

The discussion of discrimination in fact in Chapter 3B[83] is thus applicable to the right to equality, but with two qualifications. The first concerns the criterion of residence, which, except in the case of providers, is usually unacceptable as a basis for discriminatory national measures relating to the right to pursue a livelihood.[84] Although this criterion is similarly unacceptable in principle in the area of equal treatment, there are nevertheless certain specific rights that may be fairly based upon it. There would seem to be good reason, for example, why a Member State would wish to reserve the right of access to scarce housing facilities to persons who plan to reside permanently on its territory. Similarly a Member State can surely restrict educational rights and social and fiscal benefits unconnected to employment or self-employed activity to residents. Why should a person who lives in Member State A be able to require Member State B, where he works, to educate his children or pay him social welfare? It could be argued that such rights accrue to him by virtue of the taxes that he has paid to the state of employment, but more often than not such frontier workers pay tax in their state of residence.[85] However, the Court of Justice tends to extend as many benefits as possible to non-nationals, and it might well adopt the same approach here. Its task will be made easier by the fact that only educational rights are expressly linked to the criterion of residence in the secondary legislation.[86]

The second qualification of the discussion on discrimination in fact in Chapter 3B is that the Court of Justice appears to be less willing to accept objective justification of general measures that disadvantage non-nationals when they relate to the right to equality. For example, whereas it has accepted the need for national qualifications as a prerequisite to the right to pursue a livelihood without enquiring into whether the duplication involved is really justified by the public interest that it serves,[87] it has not been so understanding with regard to similar duplications unrelated to employment or business activities. In Choquet (16/78) it refused to accept without question that the dictates of road safety necessarily justified a German law requiring a Frenchman with a valid French driving licence to take another driving test in Germany; it held instead that the requirement would contravene the Treaty if it was unreasonably burdensome in proportion to its contribution to road safety.[88]

Harmonisation

The harmonising provisions of secondary Community law are concerned primarily with putting in place mechanisms that will enable non-nationals to pursue their livelihood. Their relevance to the right to equality is limited to the equality that flows from the establishment of uniform conditions of taking up and pursuing certain activities, such as direct insurance[89] and the business of credit institutions,[90] and to some specific equality rights that they contain. The latter occur mostly in the health care directives on the mutual recognition of qualifications and are in fact superfluous in view of the direct applicability of the Treaty.[91]

Private Discrimination

The main thrust of both the Treaty and the secondary legislation is against discrimination through the legislative, administrative and executive acts of the Member States, but the Court has expanded the scope to include what may be termed the "semi-public" acts of individuals and private associations.[92] Thus, any rules from any source that aim at regulating social conduct or affairs in a collective manner are subject to the non-national's right to equal treatment.

FOOTNOTES

Chapter 4A

[1] As amended by Directive 82/76, 1982, O.J. L43, p. 21.

[2] As amended by Directive 78/669, 1978 O.J. L225, p. 41.

[3] 1981 O.J. L143, p. 1. The amendment took effect on July 1st, 1982.

[4] Only Regulation 1390/81 uses Article 235 as its authority.

[5] 1981 O.J. L378, p. 1. The amendment took effect on July 1st, 1982.

[6] Only Regulation 3795/81 is based on Article 235.

[7] In fact this situation lasted a little longer, as it was not until 1974 that the Court of Justice stated that the Treaty provisions had become directly applicable and directly effective - see Chapter 1, pp. 19-21.

[8] For a discussion of this system, see Chapter 3A, pp. 181-184.

[9] For a discussion of the continued importance of the general programmes for the right to pursue a livelihood - see Chapter 3A, pp. 183-184.

[10] With the exception of Regulation 1251/70, all these pieces of legislation superseded previous enactments, of which only Regulation 3 on social security, the precursor of Regulation 1408/71, retains any relevance for this study. Some of the crucial decisions of the Court of Justice in the social security field were made on the basis of Regulation 3, and its provisions will be referred to in discussing the cases. For this reason details of Regulation 3 are given in the list of secondary legislation although it is no longer in effect.

[11] See the discussion in Chapter 4D, pp. 421-422.

[12] See the discussion in Chapter 4D, p. 419.

[13] See the discussion in Chapter 4D, pp. 416-417.

[14] See the discussion in Chapter 4D, pp. 427-432.

[15] See the discussion in Chapter 4B, pp. 346-348.

[16] See Chapter 3A, pp. 183-185 for a discussion of the piecemeal liberalisation of self-employed activities.

[17] Another example is the situation of the holders of agricultural leases pursuant to Liberalisation Directive 67/531, who were not accorded equal access to credit and government aid until one year later by way of Directives 68/192 and 68/415 respectively.

[18] The only real exception is Directive 63/607 on the film industry, as Directives 67/530, 68/192 and 68/415, all of which deal with aspects of equal treatment in the pursuit of agricultural activities, have a specific purpose for which the general language of Title III would be inappropriate.

[19] Title IIIA, para. 1.

[20] Title IIIA, para. 2(i) (2(g) in the General Programme on services).

[21] Title IIIA, para. 2(f).

[22] Title IIIA, para. 2(e).

[23] Title IIIA, para. 2(j) (2(h) in the General Programme on services).

[24] *See* Co. Dirs. 63/261, art. 4; 65/1, art. 5; 65/264, art. 4.

[25] *See* Co. Dirs. 63/261, art. 6; 68/369, art. 6; 73/240, art. 5.

[26] *See* Co. Dirs. 71/18, art. 5; 73/183, art. 4; 73/240, art. 4.

[27] *See* Co. Dirs. 63/607, art. 10; 65/1, art. 5; 71/18, art. 4.

[28] Both these matters fall into the category of discrimination that is too complex to abolish in the absence of detailed rules provided by secondary legislation - *see* Chapter 1, pp. 23-24. The Treaty provides for implementing legislation in Article 48(3)(d) with respect to the right to remain and in Article 51 with respect to social security.

[29] Articles 164 and 173.

[30] *See* Chapter 1, pp. 7-8 , pp. 5-6, and pp. 29-37.

[31] *See* Co. Reg. 1408/71, arts. 46(3) and 78(2)(b)(i).

[32] Articles 27 and 28.

[33] [1967] C.M.L.R. 192 at 203-204.

[34] See Chapter 1, pp. 34-36. In addition to the *Michel S* (76/72) and *Fiorini* (32/75) cases mentioned in Chapter 1, the reader is also referred to *Casagrande* (9/74), where the Court upheld Article 12 of Regulation 1408/71 on family education rights, and *Callemeyn* (187/73), where the Court was prepared to use Article 7(2) of the same regulation to found a claim to an allowance for handicapped persons unconnected with the employment contract of the claimant.

[35] *See* Chapter 1, pp. 32-34.

[36] *See* Chapter 1, pp. 31-32.

[37] Co. Reg. 1408/71, art. 2(1).

[38] Article 22 (1) (a) of Regulation 1408/71, for example, provides for the provision of sickness and maternity benefits to persons who are staying in another Member State for whatever reason.

[39] Article 52(1).

[40] *See* pp. 34-36.

[41] Derrick Wyatt and Alan Dashwood, *The Substantive Law of the EEC* (London: Sweet and Maxwell, 1980), at p. 145 still take the view that no autonomous benefits accrue to the family under Article 7(2) of Regulation 1612/68.

[42] [1976] 1 C.M.L.R. 573 at 580.

[43] [1976] 1 C.M.L.R. 573 at 583.

[44] [1978] 3 C.M.L.R. 596 at 605.

[45] *See Callemeyn*, 187/73, [1974] E.C.R. 553 at 562, where the court explicitly states that Article 1(t) "must be understood in the widest possible sense."

[46] The decision of the Court in *Inzirillo* (63/76) was based on Regulation 1408/71 but Article 7(2) of Regulation 1612/68 was given as an alternative basis for the award.

[47] *Fiorini* (32/75) and *Inzirillo* (63/76) were decided after direct applicability, for example.

[48] *See* Chapter 1, pp. 19-21.

[49] *See* pp. 23-24.

[50] This legislation is based on the Council's residual power under Article 235.

[51] 1980 O.J.C. 12, p. 6. *See* the discussion in Chapter 4B, pp. 351-352.

[52] *See Casagrande* (9/74) and *Fiorini* (32/75).

[53] Hans Smit and Peter Herzog, The Law of the *European Economic Community* (New York: Matthew Bender, 1976-1982), C.S. 1981, *p. 2-146*.

[54] *Ugliola*, 15/69, [1970] C.M.L.R. 194 at 201.

[55] See *supra*, pp. 313-315 and Chapter 1, pp. 34-36.

[56] *See* Casagrande (9/74) and *Fiorini* (32/75).

[57] [1975] 1 C.M.L.R. 320 at 332 (emphasis added).

[58] [1976] 2 C.M.L.R. 619 at 636.

[59] The Court took the view that there would be an infringement of the right to equality where "the conditions imposed by national rules on the holder of a driving licence issued by another member-State are not in proportion to the requirements of road safety." [1979] 1 C.M.L.R. 535 at 546.

[60] For a discussion of this case, see supra, p. 315 and Chapter 4D, pp. 364-365, 424-425 and 430-431.

[61] [1975] 2 C.M.L.R. 442 at 455.

[62] [1978] 3 C.M.L.R. 596 at 604. For a discussion of this case, see supra, p. 315 and Chapter 4D, pp. 431-432.

[63] See Chapter 3 , pp. 194-199.

[64] See , infra, p. 325.

[65] In particular this is the effect of the directives coordinating the taking up and pursuit of insurance activities - see Chapter 3C, pp. 255-259.

[66] This is also the view of Jean-Claude Seche, "Free Movement of Workers Under Community Law," 14 C.M.L.Rev. 385 at 397.

[67] See Minority Schools in Albania, Case No. 182, P.C.I.J., Series A/B, No. 64. This case is discussed in Chapter 1, fn. 1. See also the provision for minority educational rights in the Canadian Charter of Rights and Freedoms, s. 23.

[68] Regulation 574/72 deals with the practical implementation of Regulation 1408/71, but it is not discussed in this study, which confines itself to the principles of the Community social security scheme.

[69] See pp. 36-37.

[70] See Chapter 1, p. 2.

[71] 5th recital.

[72] See Wyatt and Dashwood, op. cit. at p. 140:

"Freedom from discrimination for Community workers, although limited explicitly to the employment context in the Treaty, could not be achieved without requiring appropriate adjustments to all fields of national law and practice which might be likely to have an effect on the conditions under which migrants take up and pursue employment."

[73] See, supra, pp. 317-319.

[74] The final words of the 5th recital talk of the need to ensure "the conditions for the integration of ...[the non-national's] family into the host country."

[75] With respect to discrimination in fact, see Co. Reg. 1612/68, Preamble, 5th recital and art. 3(1), 2nd indent; Title IIIA, para. 4 of the General Programme on services; and Title IIIB of the General Programme on establishment. Discrimination in law is forbidden by the specific provisions on equal rights in the secondary legislation and as a general principle by Title IIIA, paragraph 1 of the general programmes in relation to self-employed persons.

[76] See Chapter 1, pp. 31-32, Chapter 3B, pp. 194-195 and infra, pp. 325-326.

[77] Walrave and Koch, 36/74, [1975] 1 C.M.L.R. 320 at 332 (emphasis added).

[78] See Chapter 2A, pp. 68-70.

[79] See Chapter 2B, pp. 99-101.

[80] See Chapter 3B, p. 194 and Chapter 4B, pp. 332-333.

[81] See Chapter 2A, pp. 69-70, Chapter 2B, pp. 100-101, Chapter 3B, p. 194 and Chapter 4B, pp. 332-333.

[82] [1974] E.C.R. 153 at 164.

[83] See pp. 194-199.

[84] See Chapter 3B, pp. 194-199.

[85] The draft directive on double taxation for frontier workers (1980 O.J. C. 12, p. 6) reflects this general practice by laying down inArticle 1 that the Member State of residence shall be the principal taxing authority.

[86] See Co. Reg. 1612/68, art. 12 and Co. Dir. 77/486, arts. 1, 3.

[87] See Chapter 3B, p. 222.

[88] [1979] 1 C.M.L.R. 535 at 546.

[89] Directives 73/239 and 79/267.

[90] Directive 77/780.

[91] See Chapter 4B, p. 340.

[92] See Walrave and Koch (36/74) and Dona (13/76) - see, also, the discussion on private discrimination in Chapter 3B, pp. 198-200 where it is suggested that private employers are bound by the Treaty.

Chapter 4B

SPECIFIC EQUALITY RIGHTS OF THE PRINCIPAL

INTRODUCTION

In this part of Chapter 4 we are concerned with those equality rights that are the subject of specific legislative action by the Council and which affect solely the employed or self-employed person. Family rights are dealt with separately, as, although they derive from the principal's right to equality, they are enjoyed by family members and thus do not affect him directly. The special social security arrangements for the principal, which are set out in Regulation 1408/71, are also discussed separately because of their complexity and detail.

EQUALITY IN EMPLOYMENT AND IN THE PURSUIT OF BUSINESS ACTIVITIES

Introduction

The right to equal treatment in all matters pertaining to employment and the pursuit of business activities is distinct from but closely related to the basic right to pursue a livelihood. Theoretically all discriminatory conditions of employment, such as low pay, inferior protection against redundancy or the exclusion of non-national health practitioners from the social security scheme of the host state, are contraventions of the right to equality, but, as has been pointed out in the Chapter 3B[1] such discrimination may also strike at the basic right itself where it renders the pursuit of a livelihood without value. Conversely, national formalities that attach to the right to pursue a livelihood but which do not subject its exercise to their fulfilment, are not considered to infringe either the basic right or the right to equal treatment, even where they apply only to non-nationals.[2] A common example of such formalities are work permits that serve purely informational purposes.[3]

Employees - Discrimination in Law

The taking up of employment. Discrimination with regard to the taking up of employment will normally affect the basic right to employment and is therefore discussed in that context in Chapter 3B.[4] There are, however, two provisions in Regulation 1612/68 that go beyond the mere removal of obstacles to a non-national's employment by offering him positive assistance in finding a job. The first of these is quite straightforward and requires the employment offices of the Member States to extend the same assistance to non-nationals as they do to nationals.[5] This provision does not go beyond the confines of the Treaty, which could be used to found a claim for such assistance in the absence of this specific right. The second provision is more complex and involves the setting up of a vacancy clearance procedure to assist persons wishing to work in other Member States. It is based on Article 49, paragraphs (a) and (d), but the procedure itself could not be enforced by direct reliance on the Treaty because of the detailed rules necessary to operate it.

This vacancy clearance procedure is set out in Part II of Regulation 1612/68. Pursuant to Article 15(1) the manpower services of each Member State are to inform each other on a monthly basis of both domestic vacancies and applicants for employment abroad by occupation and by region. This procedure provides invaluable information for employers and employees and also enables the employment services of a Member State immediately to notify the competent authorities of another Member State with appropriate available manpower when a new vacancy cannot be filled from the national labour market.[6] The authorities of a Member State who are contacted in this way are obliged to forward details of suitable applications to the services of the first Member State.[7] This procedure can be suspended by the Commission, partially or totally, with respect to a particular region or occupation at the request of a Member State[8] who is experiencing or foresees "disturbances on its labour market which could seriously threaten the standard of living or level of employment in a given region or occupation...."[9] This suspension operates without prejudice to the application of the Treaty,[10] which, given the direct effectiveness of the Treaty, merely states the obvious, as no Council regulation can limit or abrogate the right of free movement that flows from the Treaty. It does, however, deprive the aspiring migrant of a way of finding out easily and quickly what jobs are available and where.

Conditions of employment. Article 1(1) of Regulation 1612/68 gives the non-national worker the right to pursue his employment under the same conditions as nationals. Article 3(1) states the same principle in negative form by forbidding the application to non-nationals of discriminatory conditions of employment.[11] Concrete examples of prohibited discrimination of this type are furnished by Articles 7 and 8.

Perhaps the most fundamental employment rights are set out in Article 7(1), which assures the non-national of equal treatment with respect to remuneration, dismissal and, in the case of unemployment, reinstatement and re-employment. This provision was applied by the Court of Justice in Marsman (44/72) to the dismissal of a Dutch worker by his German employer. The Dutchman had suffered a 60% disability as a result of an accident at work and was in receipt of an invalidity pension. Eight months after the accident his employer dismissed him without obtaining the prior assent of the German social security authorities, which was required by German law in the case of nationals in a similar position. The Court ruled that the

German law had to be construed as applying to non-nationals as well by virtue of Article 7(1) granting them equal treatment as regards dismissal from their employment. The other paragraph of Article 7 that is relevant to employment is 7(3), which provides for equal access to vocational and retraining centres. Paragraph 7(4) contains no additional rights but subjects collective agreements between employers and their employees to the above provisions.[12]

Article 8, which was amended by Regulation 312/76,[13] is concerned with trade union activities. The non-national worker is to enjoy complete equality of treatment as regards membership in trade unions and the holding of administrative and managerial positions therein. Although the public service exception does not generally apply to conditions of employment,[14] a non-national may nevertheless "be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law."[15] This restriction would appear to be consistent with the Court's interpretation of the scope of the exception in Sotgiu (152/73), for, as in the case of promotion, it can be argued that the right to equal treatment only relates to the conditions under which the non-national pursues his present position; it does not entitle him to claim access to other positions that fall within the exception.[16]

Employees - Discrimination in Fact

Discrimination in fact with respect to conditions of employment is prohibited specifically by Article 3(1) of Regulation 1612/68 and also by the general prohibition on "all covert forms of discrimination" that the Court of Justice derives from the Treaty.[17]

In most cases conditions that are attached to the pursuit of employment irrespective of nationality will affect nationals and non-nationals in like manner. There is no discrimination, for example, involved in a requirement that a worker on a construction site wear expensive protective equipment or in the denial of the right to strike to certain groups of employees, for such conditions of employment do not put the non-national worker to any particular disadvantage. But, whenever a national measure of general application does not have a like effect, it will be discriminatory in fact unless it can be objectively justified. Thus, in Ugliola (15/69), a German law allowing only German military service to be counted towards job seniority was held by the Court of Justice to be discriminatory in fact against non-German workers, who would almost always do their military service in the armed forces of their home state and so never qualify for the benefit. The possibility that the law might be objectively justifiable was not even mentioned by the Court, which supports the premise advanced earlier[18] that it adopts a stricter attitude towards general measures that disadvantage non-nationals in matters relating to their right to equality.

The use of the criterion of residence as a basis for the application of discriminatory conditions of employment will very often put non-nationals at a particular disadvantage, as they are more likely to have been hired abroad or to reside in a Member State other than that of employment. This criterion is never easy to justify, and so one would expect the Court almost invariably to reject its use in matters pertaining to equal treatment. It is thus somewhat surprising that in Sotgiu (152/73) the Court indicated a willingness to accept as valid the payment of a higher daily allowance to postal workers hired inside Germany by the German authorities. The reason given by the Court for its attitude was that the higher allowance was based not only on residence but also on a commitment to move around Germany and was in any case more limited in duration than the lower allowance payable to workers hired outside Germany.[19] Nevertheless, the Court's attitude is still questionable, for there appears from the facts before it no objective justification for not extending to workers hired outside Germany the same opportunity to take the higher allowance subject to the same conditions. It is submitted, therefore, that there was discrimination in fact in Sotgiu (152/73).

Self-Employed Persons - Discrimination in Law

General. The imposition of unfavourable conditions of doing business on non-nationals is prohibited as a general principle by the first paragraph of Title IIIA of the general programmes.[20] Specific examples of prohibited discriminatory conditions are given in the next two paragraphs. The second paragraph is the wider in scope and refers to such disparate matters as the imposition of special conditions on the pursuit of an activity,[21] the obstruction of access to sources of supply and distribution outlets,[22] restrictions on participation in the social security scheme of the host state,[23] and less favourable treatment in the event of a state-takeover of the business.[24] The General Programme on establishment mentions as well limitations on access to vocational training[25] and on the right of non-nationals to function as members of companies or firms.[26] Paragraph three details certain rights necessary to the conduct of any business, the exercise of which is not to be made more difficult for non-nationals.[27] Thus, there must be complete freedom to contract with private individuals[28] and with the state,[29] to obtain licences,[30] deal with real[31] and intellectual property,[32] borrow,[33] receive state aid,[34] sue and be sued,[35] and, in the case of establishment, join professional and trade associations.[36] Most of these matters are also dealt with in Chapter 3B,[37] for where the conditions imposed are exceptionally onerous, they strike at the basic right to pursue a livelihood.

The two general programmes also single out for elimination discriminatory practices that are peculiar either to the provision of services or establishment. In the case of services these are hindrances to the movement of materials to be supplied or used in the provision of the services[38] and to the transfer of monies needed to perform[39] or pay[40] for the services. Indirect discrimination against a non-national provider in the form of unfavourable treatment of the domestic recipient is also held to contravene the right to equality.[41] As far as establishment is concerned, there are the additional guarantees contained in paragraphs two and three that are referred to above as well as the right to the untrammelled use of key non-E.E.C. personnel, which is set out both in Title IIIA of the General Programme on establishment[42] and Article 54(3)(f) of the Treaty. Once again it should be borne in mind that where the conditions imposed on these aspects of business activity are exceptionally onerous, they will affect the right to pursue a livelihood. In the case of restrictions on the use of key non-E.E.C. personnel, it can be said that they affect the basic right where the non-national has come to rely absolutely on the services of such personnel;[43] the right to equality is affected only where the restrictions entail either the inconvenience of finding suitable replacements or making do with inferior personnel.

Many of the practices that are prohibited by the general programmes are dealt with in more detail by the directives, which, in addition to incorporating Title III,[44] also proscribe particular national measures that conflict with its provisions. On occasions the directives also clear up ambiguities in the language of the Title III. Although neither the general programmes nor the directives are now the source of the right to equality in the work place, given the direct applicability of the Treaty, the following discussion of specific aspects of that right that are dealt with by them is designed to illustrate what the Treaty entails.

Conditions and licences. Particularly ubiquitous at the time of the liberalisation of self-employed activities were national measures that subjected the pursuit of an activity by non-nationals or the use by them of licences necessary or desirable for their business to disadvantageous conditions. The directives deal with both situations. Thus, Article 3(a)(1) of Directive 64/225 lists as an illegal practice the exercise of discretionary powers by the German Minister of Economic Affairs under the Versicherungsaufsichtsgesetz "to impose on foreign nationals conditions for taking up activities in insurance...." In the same vein Article 3(2) of Directive 67/530 requires the abolition of a Belgian law under which non-national farmers could be allocated specific places in which to carry on agricultural activities. Other directives deal with disadvantages attached to the use of licences or authorisations, such as those required for the handling of toxic substances while engaging in agricultural activities[45] and for the extraction of minerals[46] and exploitation of oil and gas.[47]

It must be emphasised that the conditions at issue here are those that have to be complied with while carrying on an activity or making use of a licence. They are to be distinguished from conditions that have to be fulfilled in order to take up the activity or acquire the licence, for these are prerequisites and are discussed in Chapter 3B as restrictions that affect the basic right to pursue a livelihood.[48] These two types of conditions are similar only in that they are now both forbidden directly by the Treaty.

Social security. The right to participate in the social security scheme of the host state means in the context of the equal pursuit of self-employed activity the right to treat patients under that scheme. The right is thus only relevant to health care practitioners, but for them it is crucial, as a limitation to private patients would represent a drastic reduction of clientele in modern Europe with its comprehensive systems of state medical care.[49] However, the language of the general programmes is ambiguous on the matter, for, while the right to treat social security patients presumably flows from the general right to equality contained in paragraph one of Title IIIA, the specific reference to social security rights seems to be restricted to patients.[50] The ambiguity is resolved, at least implicitly, by the health care directives on mutual recognition, which, by expressly regulating how non-national practitioners are to be coopted into the various national health schemes,[51] clearly take it for granted that Community law gives them the right to participate in such schemes.

Participation in public works contracts. Participation in public works contracts is guaranteed to non-national contractors by Title III,[52] and the incorporation of Title III into Directive 64/429 on Manufacturing and Processing,[53] which liberalised among other activities the construction business,[54] should have removed any discrimination in this area. However, restrictions were permitted provisionally on the award of public works contracts to non-nationals in the case of providers and agencies or branches of a non-national undertaking.[55] This unequal treatment of non-national contractors, who were thus deprived under some circumstances of a lucrative source of business, continued until 1971, when the Council issued Directive 71/304, which abolished the provisional restrictions and established an unrestricted right for non-nationals "to enter into, award, perform, or participate in the performance of public works contracts on behalf of the State, or regional or local authorities or legal persons governed by public law."[56] The directive also guaranteed equal access to state-controlled supply facilities,[57] which seems superfluous in view of Title IIIA, paragraph 2(f) of the general programmes. In fact, the whole directive was technically superfluous, as the rights it granted were available through direct reliance on the Treaty, which had become directly applicable upon the end of the transitional period on January 1st, 1970. However, this direct applicability did not become effective until it was confirmed by the Court of Justice in its 1974 series of cases,[58] and so the directive was of much practical use.

State aids. Although Title III of the General programme on establishment expressly mentions the right of non-nationals to receive state aid in the host state on equal terms with nationals,[59] it does not refer to the situation where nationals may be disadvantaged by aids granted to non-nationals by their country of origin in order to facilitate their establishment in another Member State. This matter is regulated by Title VII of the General Programme on establishment, which forbids the granting by *any* Member State of "aids liable to distort the conditions of establishment." The directives include both provisions; they incorporate Title III with its guarantee of equal access to state aids and specifically prohibit, wherever appropriate, any Member State from granting "to any of its nationals who go to another Member State for the purpose of pursuing any activity...any aid liable to distort the conditions of establishment."[60]

Professional and trade associations. The right to join a professional or trade association where membership is necessary in order to be able to take up an activity directly affects the right to pursue that activity and is discussed in Chapter 3B.[61] The non-national's right to equality in pursuing his trade or profession, on the other hand, requires that this compulsory membership be held under the same conditions as apply to nationals and that the non-national also be entitled to optional membership. These equality rights are guaranteed by Title IIIA of the General Programme on establishment,[62] but there is no similar express provision in the General Programme on services, although the rights are doubtless encompassed by the general right to equality set out in paragraph one of Title IIIA of that programme. Once again, however, any ambiguity is resolved by the directives, which confer on all non-nationals a general right to join professional and trade associations under the same conditions as nationals, whether they are established or providing services.[63] The directives also accord established non-nationals the right to be elected or appointed to high office in these associations with the proviso that "such posts may be reserved for nationals where, in pursuance of any provision laid down by law or regulation, the organisation is involved in the exercise of official authority."[64] Unlike the similar exception with respect to employed persons holding office in a trade union,[65] this proviso may well be inconsistent with the Court's interpretation of the scope of Article 56 of the Treaty, for it makes no attempt to relate the restriction to the actual exercise of official authority by the non-national.[66] Since the direct applicability of the Treaty all these rights flow directly from it, which explains why the health care directives make no mention of them.

Self-Employed Persons - Discrimination in Fact[67]

The application of the same conditions to the pursuit of business activities by nationals and non-nationals alike will not normally involve discrimination in fact, as both will be affected in the same manner. For example, if a national undertaking is obliged to pay a certain minimum wage to its employees or to observe costly environmental regulations, a non-national undertaking must expect to follow suit. There are, however, three situations in which the imposition of conditions on the conduct of business irrespective of nationality will place the non-national at a particular disadvantage. In these situations, therefore, the conditions will have to be objectively justified if they are not to be struck down as discrimination in fact.

The first situation occurs when conditions are imposed to which nationals have adapted themselves over the years but which cause problems for non-nationals, who have not had the same opportunity to become accustomed to them. Two frequent instances of such conditions are general restrictions on the use of non-E.E.C. personnel and national procedures for the award of public works contracts. Clearly the national undertaking that has become used to doing without non-E.E.C. personnel or that is familiar with the national rules for obtaining public works contracts will be in a better position than its non-national counterpart, where the latter has, by virtue of different laws in its home state, no such custom or familiarity. It will, however, be relatively easy for the host state to justify the conditions in such circumstances, for the same rationale that led to the adoption of the measures for nationals will apply with equal force to non-nationals. Nevertheless, Community law has provided some relief for non-nationals in the area of public works contracts through Directive 71/305. This directive attempts some coordination of the various national procedures for awarding such contracts, although the thorny issue of national technical specifications is left largely unresolved.[68] It may also be that Article 54(3)(f) of the Treaty can be interpreted as bestowing an absolute right to the use of non-E.E.C. personnel, but this is unlikely. Not only is the provision not directly applicable, but it is a well-established principle that the Treaty does not require the elimination of general national measures that can be objectively justified.[69]

The second situation comprises those general measures that, by virtue of the very nature of the subject matter they regulate, will invariably affect only non-nationals. Any conditions relating to the transfer of monies or equipment from state to state in connection with the provision of services fall into this category, as do formalities that result in non-nationals being deprived of the right to treat patients under the host state's social security scheme. Hindrances to the transfer of equipment can theoretically be justified, as long as they do not fall afoul of the Community rules on the free flow of goods, but Directive 63/340 forbids any interference with the international transfer of money for the performance of services.[70] The health care directives deal with social security formalities by exempting non-national providers, who may not have the time to comply with them, from the need to do so.[71] These directives do, however, expressly permit Member States to require all non-national doctors and dentists to take a formal training course in order to practice under their health schemes,[72] and this can be said to impose on them a disadvantageous condition of practice.[73]

The third situation is the application of disadvantageous conditions of doing business on the basis of residence. The use of this criterion is very difficult to justify, and the conditions are likely to be considered discrimination in fact. This is so even in the case of providers, for the argument that national rules can only be enforced against them by complicating the conduct of their business cannot be sustained.[74]

The Effect of the Treaty.

The direct effect of the Treaty means that its provisions rather than the secondary legislation on equality in employment and self-employment are the source of this right. In the case of employees this has made little, if any, difference, for the provisions of Regulation 1612/68 are quite comprehensive. The ability to base their right to equality directly on the Treaty is, however, necessary for the self-employed, as they were protected under the directives only in relation to activities that were liberalised by them. Now that the Treaty affords them a comprehensive right to pursue self-employed activities, it has to be complemented by a general right to conduct these activities in conditions of equality. Nevertheless, the directives retain their importance as a guide to what this right to equality means for self-employed persons.

EQUAL TAX AND SOCIAL BENEFITS

Introduction

The right to equal treatment that flows from the Treaty includes the right to receive all the social and fiscal benefits available to nationals in the host state and to have eliminated any disadvantages emanating from national measures based on criteria that discriminate in fact against non-nationals. Non-nationals do not, however, have any right to benefits that are unrelated to freedom of movement. Thus, Article 4(4) of Regulation

1408/71 excepts compensation schemes for the victims of war from the Community social security arrangements, for here the benefit arises from an obligation that a Member State owes to its nationals alone; it is not part of the social services that a non-national may reasonably expect to receive in the host state. This exception was applied in Gillard (9/78),[75] when a Belgian who had been a prisoner of war during the Second World War claimed a right to an allowance payable by the French authorities to French ex-POWs. The French court of first instance awarded the benefit to M. Gillard on the basis of Regulation 1408/71, but the award was overturned by the Nancy Court of Appeal after a reference to the Court of Justice, which held that the payment came within the exception. Presumably the social and tax advantages available under Article 7(2) of Regulation 1612/68[76] are subject to the same exception despite any express provision to that effect.

Employees - Discrimination in Law

The secondary provisions. The secondary provisions setting out the social and fiscal rights of non-national employees are very inadequate. Although Article 7(2) of Regulation 1612/68 guarantees non-nationals "the same social and tax advantages as national workers," the context of the provision suggests that such equality is restricted to advantages that flow from a contract of employment.[77] The other two secondary provisions in this area are similarly narrow. Article 9 deals only with housing rights, according non-nationals "all rights and benefits accorded to national workers in matters of housing, including ownership of the housing;" it also gives them the right to have non-resident family members taken into consideration for establishing priority on a housing list when the same benefit is available to nationals. Article 3 of Regulation 1408/71 grants a right to social security coverage in the host state[78] as well as the right "to elect members of the organs of social security institutions or to participate in their nomination...."[79] Non-nationals may, however, be prevented from standing for election as members of these organs,[80] an exception that is consistent with the public policy exception in Article 48(4) of the Treaty.[81]

The Court's interpretation of the secondary provisions. Even before the direct applicability of the Treaty made it possible for a comprehensive right to equal social and tax benefits to be based on the Treaty, the Court of Justice indicated a readiness to expand the scope of Article 7(2) of Regulation 1612/68 to cover all such benefits regardless of the contract of employment. In Callemeyn (187/73) it was faced with a claim by a French woman who had suffered a 70% disability whilst working in Belgium to payment of a Belgian grant for handicapped persons that was available to all Belgian residents. The Court decided that the grant could be characterised as either social assistance, because need was the criterion for its award, or social security, because a legally enforceable right to the grant arose once need was established.[82] In the case of persons who were covered by Belgian social security law it held the grant to be social security and awarded it to Mme. Callemeyn on this basis.[83] However, it also suggested that, failing such entitlement, Mme. Callemeyn could have based a claim for social assistance on Article 7(2) of Regulation 1612/68 despite the lack of any connection between the grant and her employment in Belgium.[84]

Following its 1974 cases on the direct applicability of the Treaty[85] the Court of Justice persisted in this approach instead of relying directly on the Treaty.[86] In Fiorini (32/75) the Italian family of a deceased Italian worker in France were refused fare reduction cards on the French national railways inter alia[87] because the French authorities took the view that Article 7(2) had no application to benefits that did not attach to the worker's previous contract of employment. The Court of Justice agreed that the benefit in question did not accrue from the non-national's status as a worker but rejected the conclusion that no right to the fare cards therefore arose under the article. In the Court's view Article 7(2) applied to all available social and tax benefits:

> Although it is true that certain provisions in this article refer to relationships deriving from the contract of employment, there are others, such as those concerning reinstatement and re-employment should a worker become unemployed, which have nothing to do with such relationships and even imply the termination of a previous employment.
>
> It therefore follows that, in view of the equality of treatment which the provision seeks to achieve, the substantive area of application must be delineated so as to include all social and tax advantages, whether or not attached to the contract of employment, such as reductions in fares for large families.[88]

As a result of the **Fiorini** case (32/75) it is now certain that a non-national worker may found a comprehensive right to all social and tax benefits available in his host state on both Article 7(2) of Regulation 1612/68 and the Treaty. There will be no difference whichever choice is made, for both the Treaty and the regulation are directly applicable and both have the same scope.

Self-Employed Persons - Discrimination in Law

The secondary provisions. The secondary legislation is even more unhelpful in the case of self-employed persons. While it is true that the first paragraph of Title IIIA of the general programmes provides for them a general right to equality, it is probable that this right is restricted to conditions of doing business.[89] Certainly the specific illustrations of the equality right contained in the second paragraph are so restricted, for they include only tax benefits related to the pursuit of self-employed activity[90] and participation in the host state's social security scheme.[91] The rights granted by the directives are no broader in scope, for they just incorporate Title IIIA and occasionally mention specific business benefits that must be extended to non-nationals. Directive 63/607 on the film industry, for example, prohibits discriminatory taxes on the importation, distribution or commercial exploitation of non-national films,[92] while Directives 65/1 and 71/18 accord non-nationals providing agricultural services "the customary taxation allowances, in particular those relating to the purchase of motor fuel in performing the service in question."[93] None of the directives specifically mention an equal right to social benefits, although the right of self-employed persons to social security coverage in the host state is assured by a 1980 amendment to Regulation 1408/71.[94] They are also accorded the same right as employed persons to elect the officials of the host state's social security organs[95] but may be excluded from office themselves.[96] This exclusion is consistent with Article 55 of the Treaty as these officials doubtless exercise official authority.[97]

Effect of the Treaty. The effect of the direct applicability of the Treaty on the social and tax rights of self-employed persons has been extensive, for it has transformed a limited right to benefits connected with doing business into a comprehensive right to all such benefits that is equal in scope to that enjoyed by employed persons. The only difference in the present position of workers and self-employed persons is that the latter have only the Treaty to rely on.

Discrimination in Fact

National measures that apply irrespective of nationality but which result in non-nationals being denied a social or fiscal benefit that is available to nationals will constitute discrimination in fact unless they can be objectively justified and are proportionate to the public interest they serve. In Choquet (16/78) such discrimination was alleged by a Frenchman who was charged with driving without a licence in Germany. The Frenchman claimed that his status as a worker in that country gave him the right to have his French licence recognized by the German authorities, thus dispensing him from the obligation to obtain the German licence. The Court of Justice denied the Frenchman's right to an automatic recognition of his domestic licence on the ground that a judicial enforcement of the mutual recognition of driving licences was impossible in view of the disparities between the various national laws.[98] The Court did, however, agree that the obligation to obtain a new driving licence in a host state was an obstacle to free movement and ruled that national laws setting out such an obligation must not be disproportionate to the requirements of road safety.[99] Duplicate examinations and exorbitant fees were, in the Court's view, contraventions of the principle of proportionality.[100] The effect of the Choquet decision (16/78) was to validate national requirements that non-nationals obtain new licences and take a written test on the traffic rules of their host state but to prohibit the requirement that they take another road test. M. Choquet was thus guilty of breaching German law, as he had not obtained a German licence or taken the requisite written test.

The Court's rather unsatisfactory judgment in Choquet (16/78) highlights the main problem affecting the abolition of general national measures that have the effect of denying the non-national social and fiscal benefits, namely the impossibility of removing their discriminatory aspect without a harmonisation of national rules. In the area of social security and driving licences the necessary harmonising legislation has been forthcoming. Regulation 1408/71 adapts the generally applicable social security provisions of the Member States to the peculiar situation of the non-national migrant and thereby removes the disadvantages that they would otherwise cause him. It sets down a complex set of rules, which are discussed in Chapter 4C. Directive 80/1263 provides for the partial coordination of national laws on the issue of driving licences and the exchangeability of national licences.[101] Some national autonomy is, however, preserved by the directive, which permits Member States to refuse to accept non-national licences where the holder is not allowed to drive under their laws.[102] Non-nationals have up to one year in which to claim the right to exchange their licence for one issued by the host state.[103] The consistency of this one year limitation with the right to equal treatment under the Treaty was tested in Farrall (U.K.). The case involved a British civil servant who obtained a driving licence in Luxembourg and then returned to England, where, after waiting two years, he applied for a British licence in exchange for his Luxembourg one.[104] The British authorities denied the application under Regulation 2 of the United Kingdom Driving Licenses (Community Driving Licenses) Regulations, 1982, which implemented Directive 80/1263 in the United Kingdom. This denial was upheld by an English court as consistent with the Treaty. The decision is probably correct, as one year is quite sufficient for an exchange of licences. Both Regulation 1408/71 and Directive 80/1263 apply to both self-employed and employed persons.

There remains the problem of double taxation, which is an instance of the application of general fiscal legislation to the detriment of migrants.

Although it may well be the country of origin that is guilty of causing the problem by taxing its non-resident nationals, there is still an infringement of the right to equal treatment. It would seem to be a relatively simple matter for the Court of Justice to enforce the right to equality in this area by rejecting the right of all but one of the Member States concerned to levy taxation, but this has not been done. The reason is probably that Article 220 of the Treaty provides for the Member States to agree among themselves on the abolition of double taxation within the Community and the Court considers that this takes away its authority to act by judicial *fiat*.[105]

The adoption by the Council of the Commission's 1980 draft directive on the avoidance of double taxation would only partially solve the problem, for the directive only benefits frontier workers.[106] The solution proposed by the Commission is in any case rather odd. Instead of stipulating that either the state of employment or residence should be the sole taxing authority, the directive permits both to tax and obliges the state of residence to credit any tax paid to the state of employment.[107] This would seem to be an unnecessarily cumbersome procedure, which is rendered even more unpalatable by the provision that, where the tax levied by the state of employment exceeds that payable in the state of residence, the latter pay a cash rebate to the taxpayer concerned.[108] In effect this means that one Member State may end up contributing to another's fiscal revenues, which is absurd.

Finally, there is the question of the use of residence as a criterion for applying national laws on social and fiscal benefits. Although this criterion is generally unacceptable, it would not seem impossible for a host state to justify its use in connection with these benefits. As far as social benefits are concerned, the responsibility of the state to provide them could well be limited to those people who reside within its borders. This is particularly the case with social assistance that is provided by local authorities to residents of the area. Similarly, fiscal concessions can surely be restricted to persons who reside within a state and contribute towards its fiscal revenues. Where, however, the non-resident is taxed in the same way as residents, the criterion of residence is less easy to justify, for he is entitled to his fair share of the state's distribution of its revenues.

THE RIGHT TO REMAIN IN THE HOST STATE

The right to remain in the host state after the cessation of employment or business activity is granted by Regulation 1251/70 and Directive 75/34 respectively. This right is a matter of equal treatment, as it places the non-national who has retired or become incapacitated on the same footing as nationals in a similar position. The rules that govern the exercise of the right, however, are closely related to those governing the right of residence, and the right to remain is therefore discussed in detail in Chapter 2B.[109]

FOOTNOTES

Chapter 4B

[1] See p. 230.

[2] See the discussion in Chapter 3B, p. 194.

[3] See Chapter 3B, fn. 17.

[4] See Chapter 3B, pp. 200-205 and 206-230.

[5] Article 5.

[6] Article 16(1).

[7] Article 16(2).

[8] Article 20(3).

[9] Article 20(1).

[10] Article 20(3).

[11] 1st indent.

[12] See the discussion on private discrimination in Chapter 3B, pp. 198-200. where it is suggested that private employers are generally bound by the Treaty.

[13] 1976 O.J. L39, p. 2.

[14] See Chapter 3E, p. 298.

[15] Article 8(1).

[16] See Chapter 3E, p. 299.

[17] *Sotgiu*, 152/73, [1974] E.C.R. 153 at 164. See Chapter 4A, pp. 324-325.

[18] See Chapter 4A, p. 325.

[19] 1974 [E.C.R.] 153 at 165.

[20] Title IIIA, paragraph 1 of the General Programme on establishment requires the elimination of "any measure which...hinders nationals of other Member States in their pursuit of an activity as a self-employed person...." Title IIIA, paragraph 1 of the General Programme on services has different wording but the same import.

[21] Para. 2(c).

[22] Para. 2(f).

[23] Para. 2(i) - 2(g) in the General Programme on services.

[24] Para. 2(j) - 2(h) in the General Programme on services.

[25] Para. 2(g).

[26] Para. 2(h).

[27] It should be noted that paragraph 3 requires the abolition of conditions imposed on the exercise of these rights only "where the professional or trade activities of the person concerned necessarily involve the exercise of such power." This would seem to be an unnecessary limitation in view of paragraph 1, which forbids the imposition of discriminatory conditions on non-nationals under all circumstances, and it makes more sense to interpret paragraph 3 more broadly as a closer articulation of paragraph 1.

[28] Para. 3(a).

[29] Para. 3(b).

[30] Para. 3(c).

[31] Para. 3(d).

[32] Para. 3(e).

[33] Para. 3(f).

[34] Para. 3(g).

[35] Para. 3(h).

[36] Para. 3(i). The absence of a similar provision for providers is discussed *infra*, p. 342.

[37] *See* pp. 231-232.

[38] Title IIIB.

[39] Title IIIC.

[40] Title IIID.

[41] Title III, paragraph 1.

[42] Paragraph 4. The conditions under which this right can be claimed are discussed in Chapter 3B, pp. 232-233.

[43] *See* Chapter 3B, pp. 232-233.

[44] See Chapter 4A, fn. 18.

[45] Co. Dirs. 65/1, art. 5(3)(c); 71/18, art. 4(c).

[46] Co. Dir. 64/428, art. 4(1)(c).

[47] Co. Dir. 69/82, art. 3(1)(c).

[48] See p. 220 and p. 223.

[49] The absence of this right may well render the right to practice worthless - see Chapter 3B, p. 230, 231 and pp. 234-235.

[50] Title IIIA, para. 2(i) of the general programme on establishment (2(g) of the General Programme on services) mentions only benefits that can be obtained by patients under social security schemes.

[51] Co. Dirs. 75/362, arts. 17, 21; 77/452, art. 12; 78/686, arts. 16, 20; 80/154, art. 14.

[52] Paragraph 3(b) - but see fn. 27.

[53] Article 1.

[54] Ibid.

[55] See the Preamble to Directive 71/304, 1st. recital.

[56] Article 1.

[57] Article 3(2)(b).

[58] See Chapter 1, pp. 19-21.

[59] Paragraph 3(g) - but see fn. 27.

[60] See Co. Dirs. 63/251, art. 6; 67/654, art.7; 69/82, art. 4; 71/18, art. 6; 74/557, art. 6.

[61] See p. 201 and pp. 210-211.

[62] Paragraph 3(i) - but see fn. 27.

[63] See Co. Dirs. 64/429, art. 5; 68/365, art. 4; 71/18, art. 5; 74/557, art. 5.

[64] Ibid.

[65] See, supra, p. 335.

[66] See Chapter 3E, pp. 292-294.

[67] See also the discussion in Chapter 3B, pp. 194-199.

[68] See Article 10.

[69] See Wilhelm, 14/68, [1969] C.M.L.R. 100 at 121.

[70] Article 1.

[71] Co. Dirs. 75/362, art. 17; 77/452, art. 12; 78/686, art. 16; 80/154, art. 14.

[72] Co. Dirs. 75/362, art. 21; 78/686, art. 20.

[73] See the discussion in Chapter 3B, pp. 234-237.

[74] This argument is used to justify the use of the criterion of residence in the case of restrictions on the right to pursue a livelihood - see Chapter 3B, p. 209 and p. 212.

[75] See, too, Even (207/78).

[76] This article is discussed infra.

[77] It comes between 7(1) on equal conditions of employment and 7(3) on vocational and re-training rights.

[78] Paragraph 1.

[79] Paragraph 2.

[80] Ibid.

[81] See Chapter 3E, pp. 292-294.

[82] [1974] E.C.R. 553 at 561.

[83] [1974] E.C.R. 553 at 562.

[84] Ibid.

[85] See Chapter 1, pp. 19-21.

[86] The reasons for this persistance are discussed in Chapter 4A, p. 317.

[87] The cards were also refused on the ground that family members had no rights under Article 7(2) - see the discussion of this point in Chapter 4A, pp. 313-314 and 4D, pp. 421-422.

[88] [1976] 1 C.M.L.R. 573 at 582. The Court's reasoning is questioned in Chapter 1, p. 35.

[89] See the discussion in Chapter 4A, pp. 308-309.

[90] Paragraph 2(e) prohibits national measures that make the pursuit of self-employed activity "more costly by taxation."

[91] Paragraph 2(i) of the General Programme on establishment; paragraph 2(g) of the General Programme on services.

[92] Article 10.

[93] Articles 2(3)(a) and 4(a) respectively.

[94] Article 3(1), as amended by Regulation 1390/81.

[95] Article 3(2), as amended.

[96] Ibid.

[97] See Chapter 3E, pp. 292-294.

[98] [1979] 1 C.M.L.R. 535 at 544.

[99] [1979] 1 C.M.L.R. 535 at 545.

[100] Ibid.

[101] Article 8.

[102] Ibid.

[103] Ibid.

[104] In this case it was a national who claimed the benefit of the directive, but its main effect will be to remove discrimination in fact against non-nationals.

[105] See Chapter 1, pp. 23-24.

[106] Article 4. Frontier workers are employed and self-employed persons who return at least weekly to their state of residence.

[107] Article 4(1),(2),(3).

[108] Article 4(3).

[109] See pp. 93-94.

Chapter 4C

THE RIGHT TO SPECIAL SOCIAL SECURITY ARRANGEMENTS

Introduction

The right of non-nationals with respect to the social security scheme of the host state derives from their general right to the same social advantages as nationals. It includes, as always, a right to protection against discrimination both in law and fact. The former is a straightforward matter and is dealt with by Article 3 of Regulation 1408/71. The first paragraph confers on persons covered by the regulation "the same obligations and...the same benefits under the legislation of any Member State as the nationals of that State," while the second paragraph gives them the right to elect officials of the social security organisations. Eligibility to hold such office is left to be determined by the Member State concerned,[1] presumably because the office would involve the exercise of official authority. This reserve of national discretion would seem justified.[2]

Both paragraphs 1 and 2 of Article 3 merely specify rights that could also be enforced by direct recourse to the Treaty provisions on personal mobility and to Regulation 1612/68[3] or the directives on self-employed activities,[4] as they do not involve a complex adjustment of national provisions.[5] In its judgments dealing with discrimination in law in the area of social security the Court of Justice normally relies on Regulation 1408/71. In Smieja (51/73) it held that the refusal of the Dutch authorities to pay a supplementary old age pension to a German worker was a violation of Article 3(1) of the regulation, which took precedence over section 44 of the Dutch Old Age Pensions Act restricting eligibility to

Dutch nationals.[6] By contrast, in Hirardin (112/75), a French law providing for only French nationals to have periods of employment in Algeria counted towards the calculation of pension benefits was considered by the Court to be inconsistent with Articles 48 to 51 of the Treaty.[7] In Michel S (76/72) a non-national's entitlement to a supplementary social security benefit was based on Article 12 of Regulation 1612/68, while in Inzirillo (63/76) Article 7(2) of the same regulation was advanced as an alternative basis to Regulation 1408/71 for awarding a similar benefit to a non-national.[8]

Discrimination in fact as it relates to social security is a much more complex matter. Most national schemes have prerequisites, such as a minimum period of insurance or the materialisation within the competent state[9] of the risk insured against, or are subject to conditions of application like a requirement of residence for receipt of a benefit. Such stipulations are clearly based on the assumption that a person will only work and reside in that one member state, which, even where applicable irrespective of nationality, is bound to disadvantage non-nationals. The problem with this type of discrimination is that it is not susceptible of an easy solution; it requires instead a detailed adaptation of national social security legislation to the needs of migrant, largely non-national, employed and self-employed persons. This is provided by Regulation 1408/71 with regard first to employees and then, ten years later by way of an amendment,[10] to the self-employed. Because of the involved nature of the legislation, it is unlikely that the special social security arrangements enshrined in Regulation 1408/71 could be invoked by direct recourse to the Treaty or to the secondary legislation on equal treatment.[11]

In the following sections of this chapter there is a discussion of the solutions that are provided for the main problem areas, to wit: aggregation, non-discriminatory calculation of the amount of the benefit, the removal of discriminatory prerequisites, payment outside the competent state, applicable legislation and overlapping of benefits. A comprehensive discussion of the whole Community system is not the aim. First, however, there is a need to establish who and what is covered by Regulation 1408/71.

Persons Covered by Regulation 1408/71

Article 2(1) of Regulation 1408/71 declares that the regulation applies "to employed and self-employed persons who are or have been subject to the legislation of one or more Member States...." This rather broad statement is qualified by Article 1(a), which sets out the types of social security schemes to which a person must be affiliated in order to come within Article 2(1). Generally speaking it can be said that only those persons with a past or present work connection in the state of affiliation will meet the test of Article 1(a). There are three ways in which this work connection can be established:

a) by affiliation to a compulsory scheme for employed or self-employed persons;[12] or

b) by affiliation to a compulsory scheme for all residents provided either i) the scheme is administered or financed in such a way as to permit an identification of the person covered with an employed or self-employed person, or ii) the person covered is insured for some other contingency under a scheme that meets criterion (a) above;[13] or

c) by affiliation to a voluntary scheme provided that the person covered is either i) presently employed or self-employed, or ii) was previously covered by a scheme that meets criterion (a) above.[14]

The only exception to the need for a work connection is where a person is compulsorily insured under a scheme for the whole rural population.[15]

To the extent that Regulation 1408/71 permits persons with no present work connection to be protected by Community law, it might be thought to go beyond the confines of the Treaty. Its consistency with the Treaty was, however, confirmed by the Court of Justice in Unger (75/63), where a German who had given up her employment in the Netherlands and was only voluntarily insured under a general Dutch scheme for all residents (affiliation (c) above) was held to be validly covered by the provisions of Regulation 3, the precursor of Regulation 1408/71. She was therefore entitled to have the costs of medical attention incurred by an illness during a visit to Germany paid by the Dutch social security authorities.

Another possible inconsistency with the Treaty is the fact that Article 2(1) makes it possible for a person who has never worked abroad to claim the benefits of Regulation 1408/71. This is because it is sufficient under the article that a person be subject to the legislation of a single Member State. In a series of cases in the early sixties it was argued that this possibility conflicted with Article 51, which provides that special social security arrangements are to be made for *migrant* workers. The Court of Justice rejected this argument whenever it was put forth.[16]

Matters Covered by Regulation 1408/71

Article 4(1) of Regulation 1408/71 lists the following branches of social security as coming within its application:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivors' benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;[17]

(g) unemployment benefits;

(h) family benefits.[18]

Article 4(4) of the regulation excludes social assistance and benefit schemes for the victims of war from its ambit of application. The second of these exceptions has caused no problems and was applied in Gillard (9/78) and Even (207/78) to exempt special allowances for national servicemen from the prohibition against discrimination in law contained in Article 3(1) of the regulation.[19]

With respect to the exclusion of social assistance, the Court of Justice has relied on Article 4(2), which extends the application of Regulation 1408/71 to non-contributory schemes, and a liberal interpretation of the definition of "benefits" given in Article 1(t) in order to include as many national schemes as possible within the rubric of social security. An example of the Court's approach is provided by Frilli (1/72), a case concerning an Italian recipient of a Belgian old age pension who claimed to be entitled to the guaranteed income for old persons available in Belgium to nationals alone. The Belgian authorities refused the claim on the ground that, as the supplementary allowance was payable pursuant to a general non-contributory scheme according to need, it was social assistance and not social security; hence Signora Frilli was not protected by Article 8(1) of Regulation 3[20] prohibiting discrimination on grounds of nationality. The Court of Justice dismissed the relevance of the non-contributory nature of the scheme in view of Article 2(2) of Regulation 3[21] and held that, although the use of the criterion of need was generally indicative of social assistance, the fact that all persons able to demonstrate such need were given a legal right to the benefit in question transformed it into social security. The Court then went on to interpret the definition of "benefits" in Article 1(s) of Regulation 3.[22] Pointing to the inclusion of "supplementary allowances" in the definition, it concluded that this term was not restricted to supplements payable in respect of an old age pension but applied to any supplementary payments relating to old age.[23] The Court thereupon disposed of the case by declaring that the Belgian benefit was an old age benefit under Article 2(1)(c) of Regulation 3[24] "so far as concerns employees...who are entitled in that State to a pension."[25] Accordingly, Signora Frilli was entitled to the minimum income by virtue of Article 8(1) of Regulation 3.[26]

The Court of Justice followed the same approach in Callemeyn (187/73) in order to uphold the claim of a French national living in Belgium to a means-tested grant for handicapped Belgians residing within the Kingdom. In this case the Court used a wide definition of "benefits" in Article 1(t) of Regulation 1408/71 to classify the grant as a supplement to Mme. Callemeyn's invalidity pension, although the two benefits were in no way connected.

Two possible limitations on the ability of the Court to bring social assistance within the framework of social security emerge from the Frilli (1/72) and Callemeyn (187/73) decisions. The first is that it appears from the Court's disposition of these two cases that only persons already in receipt of a social security benefit to which the general allowance can act as a supplement can claim entitlement to it. This is not so, however, for in Mazzier (39/74) the Court ruled unequivocably that all persons who come within the scope of Regulation 3 can benefit from "national legislation granting a legally-protected right to a benefit."[27] As a result the plaintiff in that case was held to share Mme. Callemeyn's entitlement to a Belgian grant for the handicapped despite the lack of any pre-existing invalidity pension. This development represents an even wider interpretation of Article 1(t), as it makes it possible to claim a supplement in the void. It was followed in Fracas (7/75) and Inzirillo (63/76), where the same grant was awarded to a non-national child who had no claim to an invalidity pension.[28] Thus, only where a benefit is payable at the absolute discretion of the national authorities can it safely be regarded as falling exclusively within the domain of social assistance.

The second limitation concerns the nature of the benefit. In all the instances where an apparent social assistance benefit has been held by the Court of Justice to be social security it was possible for the Court to relate the benefit to one of the branches of social security covered by Article 4(1) of Regulation 1408/71. A guaranteed income for old persons can easily be assimilated to an old age pension, as in Frilli (1/72), just as a grant to improve the earning capacity of a handicapped person can be equated with an invalidity pension, as in the other cases mentioned above. But many forms of social assistance do not fit into any of the categories set out in Article 4(1), so that they will have to remain as social assistance. This may explain why the fare reduction cards in Fiorini (32/75) were not treated as social security, although even there it would have been possible to classify them as family benefits.

If a benefit is social assistance as opposed to social security, all is not lost, as there is a right to such benefit under the Treaty and, in the case of employees, under Regulation 1612/68 as well.[29] The social security legislation, however, has the advantage of conferring very precise rights, including the right to payment abroad.[30] Thus, in Biason (24/74), a formerly employed person was permitted to draw both an invalidity pension and a means-tested supplement upon his return to Italy from France. Such a right may well not exist under the Treaty in relation to social assistance which, by its nature, is payable at the discretion of the national authorities; residence, in such a case, might not be regarded as a discriminatory criterion.[31]

Finally, it must be emphasised that Regulation 1408/71 aims only at coordinating national rules on social security to the extent necessary to provide proper coverage for migrant workers and self-employed persons. It does not attempt any harmonisation of the content of national social security legislation, which varies greatly from one member state to another. In France, for example, there are very high family allowances, whilst in the Netherlands old age pensions are particularly generous. Regulation 1408/71 entitles migrants to be covered fully by these various schemes, but, once covered, the migrant will have to put up with the types and level of benefits available under the law of his new host state.

Aggregation

There are various bases for entitlement to a social security benefit depending on the member state and the branch of social security involved. The three that are used in the Community, and which are recognized in Regulation 1408/71,[32] are the completion of a given number of periods of insurance, employment or self-employment and residence. In order to accomodate the different definitions of such periods in the member states, the regulation provides that it is the definition applied by the state where a period is completed that governs its characterisation.[33] Thus, in Murru (2/72), the French requirement of 480 hours of employment in the year preceeding disability in order to qualify for an invalidity pension had to be applied according to the Italian definition of employment, as the claimant had been subject to Italian social security legislation during that period. Unfortunately for the claimant, he was unemployed in Italy during the year preceeding disability and, unlike French law, Italian law did not recognize unemployment as equivalent to employment. Hence Signor Murru was not entitled to the French invalidity pension. However, if the legal positions had been reversed, France would have had to pay the benefit even though it did not recognize unemployment as equivalent to employment. This type of situation occurred in Frangiamore (126/77), where the Belgian authorities initially rejected a claim to unemployment benefits by a person whose periods of employment in Italy were not considered by Belgian law to constitute the periods of insurance necessary to obtain such benefits. The Court of Justice ruled that, as the periods of employment were considered to be periods of insurance in Italy under whose legislation they were completed, the claim was to be upheld.

The aim of aggregation is to ensure that persons who move within the Community are guaranteed their accrued rights and advantages.[34] It does this by requiring all Member States whose legislation bases entitlement to a social security benefit on the completion of a certain number of periods of insurance, employment, self-employment, or residence to take into account periods completed under the legislation of another Member State. Again mindful of the divergences between national legislations, the system of aggregation adopted in the regulation provides for the acceptance by other Member States of whatever basis is used to determine entitlement in a particular state.[35] Thus, where Member State A bases entitlement to a benefit on the criterion of residence, periods of residence completed in that state must be taken into account in determining entitlement to the same benefit under the legislation of Member State B, even though the latter uses insurance or employment periods as its basis. Article 18(1) on aggregation in the field of sickness and maternity benefits illustrates the principle well:

> The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of insurance periods or periods of employment or residence shall, to the extent necessary, take account of insurance periods or periods of employment or residence completed under the legislation of any other Member State as if they were periods completed under the legislation which it administers.

This provision would require a member state that sets six months employment as the basis for a claim for sickness benefits to accord such benefits to a person who has completed only one month of employment under its legislation, if:

a) that person has previously completed five months of insurance, employment or residence in any other member state, and

b) the other member state recognises the type of period completed - for example, five months of residence without paying insurance or being employed - as a basis for entitlement to sickness benefits under its legislation.

The other provisions on aggregation are not as broad as Article 18(1). In the case of invalidity benefits, aggregation applies only to insurance periods, where the amount of the benefit is independent of the duration of the periods,[36] and only to periods of insurance or residence, where the amount is so dependent.[37] Periods of insurance or residence are also the only criteria susceptible of aggregation in determining entitlement to old-age pensions[38] and death grants,[39] while aggregation with respect to unemployment[40] and family benefits[41] is restricted to periods of insurance or employment. Each provision reflects, of course, current practice in the member states, just as the absence of aggregation in the case of benefits resulting from accidents at work or occupational diseases is explained by the fact that all member states accord immediate and unconditional access to such benefits. It may, however, have been wiser for the Council to have included in the regulation a general right to aggregation along the lines of Article 18(1) in order to accomodate any changes in national legislations that could render the existing provisions ineffective.

There are other differences, too, between the various branches of social security in the way aggregation works. For example, entitlement to payment from the competent state of sickness and maternity benefits, invalidity benefits where the amount is independent of the length of the insurance periods, death grants and family benefits may arise through the use of aggregation, even though the person concerned has completed no appropriate periods under its legislation. This is not so in the case of old-age benefits, invalidity benefits where the amount is determined by the length of the insurance or residence periods, and unemployment benefits. No entitlement to the first two of these benefits can arise under the regulation by way of aggregation where the total length of the periods completed under the legislation of the competent state is less than one year.[42] Where, however, entitlement can be established in less than a year on the basis of national legislation alone, aggregation is permitted to determine the amount payable.[43] Aggregation can only be used to found a claim for unemployment benefits where the claimant has completed lastly at least some periods under the legislation of the competent state.[44] The regulation does not specify any minimum length for these periods, but there would obviously be no need for aggregation at all if the migrant were called upon to qualify fully under the national legislation. Presumably, therefore, it is sufficient if one period of insurance or employment has been completed. Another limitation on the use of aggregation to establish a claim for unemployment benefits is contained in the last clause of Article 67(1), which stipulates that, when a Member State bases entitlement to these benefits on the completion of insurance periods, it can refuse to aggregate periods of employment completed under the legislation of other member states.[45] The effect of this limitation has, however, been much attenuated by the ruling of the Court of Justice in Frangiamore (126/77) that a Member State applying this provision is still bound by the definition principle in the regulation. In that case, therefore, Belgium was still obliged to aggregate the claimant's period of employment in Italy as it was recognized as a period of insurance under Italian law.[46]

Self-employed persons are subject to particular disadvantages with respect to the process of aggregation under Regulation 1408/71. Although periods of employment are a possible criterion on which a claim for sickness and maternity benefits, unemployment benefits and family benefits can be based, it is only in the last case that previous periods of self-employment can be aggregated.[47] A person who has been self-employed in Member State A and whose entitlement to sickness, maternity or unemployment benefits in that state was based on periods of self-employment is not able to require Member State B to take these periods into account.[48] In the case of sickness and maternity benefits, however, a self-employed person is entitled to the aggregation of any periods of insurance or residence completed in another member state.[49] But he is not accorded even this means of protecting his accrued rights to unemployment benefits; whenever a self-employed person has periods of insurance to his credit in another member state, these cannot be aggregated for the purpose of obtaining unemployment benefits if they were completed as a self-employed person.[50]

Aggregation is generally used to establish initial eligibility for a benefit, but it also has other uses. Where the amount of an old-age benefit or an invalidity benefit depends on the length of the periods of insurance or residence, it may be determined by the competent state taking into account all the periods completed within the Community.[51] Where the length of time for which unemployment benefits are payable derives from the length of the periods of insurance or employment, aggregation is used to determine the total length of these periods.[52] In the case of the other branches of social security - sickness and maternity benefits, invalidity benefits where the amount of the benefit is independent of the insurance periods completed, death grants and family benefits - aggregation is only used to establish initial eligibility; neither the amount payable nor the duration of the benefit depend on the length of the completed periods.

Non-Discriminatory Calculation of the Amount of the Benefit

The non-discriminatory calculation of the amount of a benefit is based on treating the migrant as if he had always worked in the host state and on considering his family as residents of the host state regardless of their actual state of residence. The latter is a relatively straightforward concept. Whenever the amount of a benefit varies with the number of members of the family, the competent state is required to take into account family members of a person subject to its legislation wherever they reside in the Community. This is an absolute obligation with respect to cash benefits[53] deriving from sickness,[54] maternity,[55] accidents at work[56] or occupational disease,[57] and in the case of invalidity[58] and old-age[59] pensions, except to the extent that a member state may invoke the provisions of Regulation 1406/71 against overlapping benefits.[60] In the case of unemployment and family benefits the competent state may disregard non-resident family members who are entitled to benefits in their state of residence.[61] But the competent state may only take into account the actual amount received in the other state. In Ragazzoni (134/77) and Rossi (100/78), for example, no reduction was possible in the amount of family benefits due under Belgian legislation as the family members still resident in Italy did not receive any benefits from the wife's employment there. There is a special rule governing the payment of family benefits to non-resident family members under French legislation; the amount of these benefits is determined by the legislation of the family's state of residence, although entitlement is established by French law.[62] The place of residence of family members is irrelevant in the case of death grants, the amount of which is always calculated without reference to the family of the deceased.

The migrant is to be treated as though he has always worked in the host state whenever financial criteria have to be established for the purpose of calculating the amount of a benefit. In the case of cash benefits for sickness or maternity, for example, which are based either on average or standard earnings, the competent state must determine such earnings exclusively on the basis of earnings paid or payable during the periods completed under its legislation.[63] An identical provision exists for the calculation of cash benefits deriving from accidents at work and occupational diseases.[64] Unemployment benefits, the amount of which is invariably linked to the level of the previous wage or salary, must similarly be calculated only by reference to the wage or salary received by the unemployed person in the host state.[65] Such a calculation is not feasible if the migrant has been employed in the competent state for less than four weeks, but, even here, the general principle is upheld; the competent state must calculate the benefits "on the basis of the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment to his last employment in the territory of another Member State."[66] The calculation of the amount of old-age pensions is the most complex, involving the use of such disparate criteria as average earnings, average contributions and the ratio between the claimant's gross earnings and average gross earnings.[67] However, the principle is still the same; the figures used must either relate exclusively to periods completed under the legislation of the competent state or, where this is not possible, correspond to equivalent figures obtaining in the competent state during the relevant periods.[68] As a rule, death grants, family benefits and invalidity benefits are fixed by criteria other than previous financial performance and do not need provisions of this kind. An exception is invalidity benefits where the amount of the benefit is increased if the insurance periods were completed under a special scheme.[69] To guarantee equal treatment of migrants in such circumstances, the competent state must take into account insurance periods completed in another member state either under a corresponding scheme or in the same occupation or employment.[70] It is only where, account having been taken of all these periods, the migrant concerned does not qualify for the higher amount that it may be withheld from him.[71]

The Abolition of Discriminatory Prerequisites

The subjection of an entitlement to social security benefits to prerequisites that migrants might have difficulty in fulfilling is prohibited as a general principle by Article 3(1) of Regulation 1408/71, which accords all persons covered by the regulation "the same benefits...as nationals...."

This article was applied by the Court of Justice in Mazzier (39/74) to make a Belgian grant available to a handicapped Italian woman despite her failure to meet the condition that her illness be first diagnosed in Belgium.[72] In addition to Article 3(1) there are a few provisions in the regulation that proscribe specific prerequisites for entitlement to a social security benefit that migrants might have difficulty in fulfilling. Article 35(3) precludes any conditions as to the origin of an illness being placed on the granting of sickness benefits, while Article 57(2) stipulates in like vein that, where it is a condition of entitlement to benefits resulting from an occupational disease that the disease be first diagnosed in the competent state, "such condition shall be deemed to be fulfilled if the disease was first diagnosed in the territory of another Member State."[73] In the case of benefits for accidents at work while travelling and death grants, the accident or death respectively are always deemed to have occurred in the territory of the competent state.[74] Where the granting of invalidity or old-age benefits is conditional upon the claimant being subject to the pertinent legislation at the time the benefits become payable, the person concerned is deemed to be still so subject as long as he is subject to the legislation of another member state at that time.[75] Finally, Article 40(3) provides that the requirement in most Member States that a person must have received cash sickness benefits prior to entering a claim for an invalidity pension is met when such benefits have been received under the legislation of another Member State.

The Payment of Benefits Outside the Competent State

The general principle that benefits must be paid regardless of the place of residence of the recipient is enshrined in Article 10(1):

> Save as otherwise provided in this Regulation, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.

An attempt was made by the Dutch government in Smieja (51/73) to limit the application of Article 10(1) to cases where the national legislation permits payment abroad when it denied to a German worker who had returned to Germany after having been employed in the Netherlands a supplement to his pension that, according to Dutch law, was only payable to residents of the Kingdom. The Dutch argued that, as no right to the supplement was "acquired under the legislation of one or more Member States,"[76] Article 10(1) had no application. The Court of Justice rejected this interpretation and held that "the phrase 'legislation of one or more Member States' must be interpreted as embracing the relevant provisions of Community law."[77] The Dutch legislation thus had to be read subject to Article 10(1), which had the effect of eliminating the condition as to residency. The Court took the same approach in Biason (24/74) when it struck down a French provision that prohibited the payment of a supplementary invalidity allowance to an Italian who had returned home.

Certain branches of social security are not included in the scope of Article 10(1) because of special rules that attach to them. For instance, cash benefits and benefits in kind[78] for sickness, maternity, accidents at work and occupational diseases to recipients who are residing temporarily or permanently outside the competent state are provided by the competent state either directly or through the agency of the state of residence or stay.[79] Where the latter state assumes the responsibility for providing the benefit, payment abroad by the competent state takes the form of reimbursement of that state[80] or, where reimbursement is waived,[81] of an undertaking to provide similar services if the need arises. The receipt of such benefits outside the competent state is subject to conditions under certain circumstances. They can only be obtained during a temporary stay in another member state when the health of the recipient "necessitates immediate benefits,"[82] or when the recipient is authorised by the competent state to go to that member state for treatment.[83] This authorisation may not be refused where the treatment cannot be obtained in the person's state of residence[84] "within the time normally needed for obtaining the treatment in question... taking account of his current state of health and the probable course of the disease."[85] *A fortiori* the authorisation cannot be withheld where the necessary treatment is not available in the state of residence[86] or is not as effective.[87] A recipient must also obtain permission to return[88] or transfer his residence to a member state other than the competent state if he wishes to do this after having become entitled to benefits while in the competent state.[89] The permission can only be withheld when the move would prejudice recovery.[90]

The payment outside the competent state of unemployment benefits is subject to considerable restrictions. The employee in question must be wholly unemployed and must fulfill the following conditions:

a) unless otherwise authorised, he must have registered with the employment services of the competent State and have remained available to them for at least four weeks after becoming unemployed;[91] and

b) he must have registered with the employment services of the host state within seven days of ceasing to be available for work in the State he left;[92] and

c) he must not have previously invoked his right to payment abroad of his unemployment benefits since he was last employed.[93]

In addition, the right to payment abroad of the unemployment benefit only lasts for three months[94] and, in order to discourage loitering in foreign parts, the regulation stipulates further than continued payment of the benefit upon returning to the competent state is assured only if the unemployed person returns within the three months.[95] This stipulation was enforced with particular strictness in Testa (41/79) against an Italian who had left Germany to seek employment in Italy and returned a day late. His German unemployment benefits were paid to him during his time in Italy by the Italian authorities[96] subject to reimbursement by Germany,[97] but his continued entitlement to them upon his return to Germany was held to be extinguished under Article 69(2) of the regulation because of his lateness.

None of the provisions of Article 69 relating to eligibility for benefits while abroad or to a continuation of them upon a return to the competent state apply, however, to unemployment benefits payable under national law alone. Thus, in Bonaffini (27/75), an Italian worker who returned to Italy after losing his job in Germany was given the right to claim his Italian unemployment benefits despite his failure to remain available to the German employment services for four weeks prior to leaving Germany.[98] The Court of Justice held that, as entitlement arose by the operation of Italian law without any need for the regulation, the obligation of availability set out in Article 69 had no application.[99] Presumably, therefore, the claimant in Testa (41/79) would not have been prejudiced by his late return if his right to a continuation of the unemployment benefits had arisen under German law rather than by virtue of Article 69.

The general rule with respect to family benefits is that they are payable abroad where this is necessary.[100] Moreover, where two member states so agree[101] or where it is established that family benefits are being misapplied by the employed or self-employed person,[102] payment must be made outside the competent state to the person actually maintaining the family. This may be done directly or through the agency of the state of residence of the family.[103] In the case of France, under whose legislation the amount of family allowances is determined by the legislation of the state of residence of the family members,[104] the allowances must be paid directly to the person actually maintaining the family.[105] This is done by the state of residence of the family[106] subject to reimbursement by France.[107]

Applicable Legislation

Article 13(1) of the Regulation sets down the principle that migrants are to be subject to the legislation of a single member state only.[108] Articles 13(2)(a) and 13(2)(b) provide that as a general rule the applicable legislation shall be, respectively, the place of employment or self-employment, regardless of the member state of residence of the person concerned or of his employer.[109]

The general rule does not apply to temporary work in another member state; the person concerned will continue, pursuant to Articles 14(1) and 14a(1), to be subject to the legislation of the member state where he normally works as long as:

a) the anticipated duration of the work does not exceed twelve months,[110] or, if it does, the member state in which the work is being performed gives its consent;[111] and

b) in the case of an employed person, he is sent to work in another member state by and for his domestic employer but not as a replacement for another person who has completed his term of posting.[112]

The application of this special rule was discussed by the Court of Justice in Manpower (35/70), where an employment agency established in

France sent someone to work for a firm in Germany. The worker fell ill shortly after his arrival in Germany and needed medical attention. The benefits in kind were provided by the French agency, which then claimed reimbursement from the French social security authorities. Reimbursement was refused on the ground that the worker had been subject to German law during the illness as Germany was the state of employment. The matter came before the Court of Justice, which decided that the employee had remained subject to French law under Article 13(a) of Regulation 3[113] and that reimbursement should be made to the agency. In the Court's view, the special rule applied as the agency paid the employee and retained a power of dismissal over him and because the contract for his services was between the agency and the German firm; the agency thus remained the worker's real employer.[114] The situation with self-employed persons is much simpler. They have only to show that the anticipated duration of their activity in another member state is not more than twelve months and the special rule will automatically apply. It is noteworthy that, although these provisions clearly are intended to deal with the problem of social security coverage for providers of services and their employees, they also apply when no services are provided. Unfortunately, there is no clear right of entry or residence for persons who wish to perform temporary work in another member state that does not involve the provision of services.[115]

Articles 14(2)(b) and 14a(2) contain additional special rules for persons who are normally employed or self-employed, respectively, in two or more member states. If the person pursues any part of his activity in the member state where he resides, he is subject to the legislation of that State.[116] Where this is not the case, the rules differ. The self-employed person will be subject to the legislation of the member state where he pursues his main activity;[117] the employee will normally come under the legislation of the member state in which his employer has his registered office or principal place of business.[118] Once again the social security arrangements outstrip the rights of entry and residence, which may be available only to employees who work abroad for an employer of the host state.[119] These arrangements, by contrast, also cover employees working in another Member State for a domestic employer.

The aim of the principle set out in Article 13(1) and of the rules contained in Articles 13(2) and 14 is to prevent the application to the same individual of the social security law of both the state of residence and the state of employment. It is not, however, completely clear from the decisions of the Court of Justice whether it considers this aim to be consistent with the Treaty or not. In a series of decisions on Regulation 3, which did not contain an equivalent to Article 13(1),[120] the Court ruled that duplication could only be precluded by that regulation where it involved the payment of two sets of contributions without any corresponding increase in social benefits.[121] Accordingly, in Moebs (92/63) and van der Vecht (19/67), two residents of the Netherlands who were employed in Belgium and France respectively and subject to the legislation of those states by virtue of Regulation 3 were held to be entitled to additional social security benefits available under Dutch law on a non-contributory basis. The Court took the view that to hold otherwise would amount to a withdrawal of the protection of national law in contravention of Articles 48 to 51, which are intended to improve the migrant's lot but not to deprive him of rights that he possesses at national law.[122] This reasoning is attractive in the context of these two cases, for the additional application of the legislation of the state of residence resulted in benefits without any duplication of contributions; it is more questionable where it involves the migrant in payment of double contributions whether he wishes the additional coverage or not and whether the extra benefits are worth the outlay or not. Yet, at least with respect to Regulation 3, the Court's reasoning applies with equal force to both situations.

The introduction into Regulation 1408/71 of Article 13(1) establishing the principle that a person "shall be subject to the legislation of a single Member State only" represents an attempt by the Council to clear up any ambiguity in Regulation 3 and encourage the Court to apply only one legislation. This new article was considered by the Court in Perenboom (102/76), where it was used by a Dutch resident who had been employed for four months in Germany to challenge as assessment for contributions to the Dutch social security scheme in respect of that period. The Dutchman claimed that, as he had been subject to German social security legislation for those four months pursuant to Article 13(2)(a) of Regulation 1408/71, he was protected by Article 13(1) from having to make the contributions. The Court accepted his argument, but it is not easy to determine the import of its decision in Perenboom (102/76). At one point in the judgment the Court states categorically that "Article 13(1)...excludes any possibility of the overlapping of several national legislations in respect of one and the same period,"[123] which would suggest a total acceptance of the principle set out in the article. But elsewhere the Court bases its decision on the fact that the duplicate application of Dutch legislation in the circumstances at bar "involves the payment of contributions twice over contrary to the provisions of Regulation No. 3 and of Regulation No. 1408/71."[124] This language is very ambiguous; it is not clear whether the Court is merely following its old reasoning that double contributions cannot be required where, as here, no additional benefits are forthcoming, or whether it is taking a new stand and absolutely prohibiting the payment of double contributions.[125] The reference to Regulation 3 by the Court in Perenboom (102/76) strongly suggests that this case does not represent a shift in its reasoning, which is unfortunate. Whatever additional benefits may flow from double contributions, they are an impediment to personal mobility in that most people probably regard them as more trouble than they are worth. It is, of course, a different matter where the scheme is non-contributory and a person is getting something for nothing. To deprive migrants of such benefits would indeed contravene the Treaty, as the Court has said on many occasions.[126] For the rest the situation is still far from clear.

Two situations require particular rules and some modifications with respect to the application of the legislation of the competent state as determined according to Articles 13 and 14 of Regulation 1408/71. The first of these concerns the provision of benefits to a recipient who is staying or residing outside the competent state.

With respect to benefits deriving from sickness, maternity, accidents at work and occupational diseases, entitlement to all benefits is determined by the legislation of the competent state,[127] but only cash benefits[128] are provided by this state.[129] Benefits in kind[130] are provided on behalf of the competent state either by the member state of residence[131] or the member state where the recipient is staying when the need for benefits arises[132] or to which he has been authorised to go in order to receive appropriate treatment.[133] The member state of residence or stay is then reimbursed for these expenses by the competent state unless there is an agreement to the contrary between them.[134] Cash benefits are always provided in accordance with the legislation of the competent state,[135] but the rules governing the applicable legislation with respect to the amount and duration of benefits in kind are more complex. Where a recipient is staying in another member state[136] or has gone there for appropriate treatment[137] or has returned or transferred his residence to another member state after first having become entitled to benefits in kind whilst in the competent state,[138] the legislation of the member state of stay or residence will determine the amount of the benefits in kind, leaving their duration to be set by the legislation of the competent state. But where a recipient resides permanently in another member state and has become entitled to benefits in kind while in that state, its legislation will determine both the amount and the duration of the benefits.[139] The rules are a little different for frontier workers, who are able to receive both cash benefits and benefits in kind from the competent state in accordance with its legislation.[140] This is somewhat paradoxical, as frontier workers must, by definition, return to their state of residence at least once a week[141] and would thus seem to have a lesser connection with the competent state than other persons.

Unemployment benefits payable outside the competent state are similarly provided by the member state in which the recipient is staying to look for work,[142] but this is always done in accordance with the legislation of the competent state.[143] The regulation provides for the reimbursement of the member state of stay by the competent state.[144] Family benefits payable to persons outside the competent state, on the other hand, are the sole responsibility of that state[145] with the exception of France. Family allowances payable to non-resident family members of persons subject to French legislation are provided by their member state of residence,[146] which can claim reimbursement from France.[147] The allowances are determined by the legislation of the member state providing them, except that entitlement to them in the case of employed persons is established initially by French legislation.[148] No special arrangements govern the payment outside the competent state of invalidity and old age benefits and death grants.

Particular rules on the applicable legislation are also sometimes required in order to allot responsibility for the payment of a benefit where a person has been covered by more than one legislation in respect of the risk. In the case of sickness, maternity, accidents at work and family benefits, however, none are necessary as no member state incurs any responsibility merely because the claimant was once subject to its legislation. This is so for occupational diseases as well, even though the claimant may have pursued an activity likely to cause the disease in more than one member state.[149] There is only a minor exception for sclerogenic pneumoconiosis, where there is a pro-rata division of responsibility for payment of the benefit between the member states in which the afflicted person practised an occupation liable to encourage the disease.[150]

Invalidity benefits fall into two categories. Where a person has been subject exclusively to legislation under which the amount of the benefit is independent of the duration of the periods completed, the responsibility for payment falls upon the member state whose legislation is applicable at the time the invalidity arises.[151] If the invalid is not entitled to any benefit under this legislation, he can still claim invalidity benefits from any other member state under whose legislation he is so entitled.[152] Aggregation is used to help determine entitlement,[153] so that, given the comparable conditions prevalent in most member states, it is unlikely that any previous member state will be liable if the claimant does not qualify in the competent state.[154] Where the claimant has been subject to legislations that relate the amount of the benefit to the length of the coverage or to a combination of both types of legislation, the allotment of responsibility is made in the same way as that for old age pensions.[155]

The payment of old age pensions is the responsibility of all the member states to whose legislation the claimant has been subject for at least a year.[156] Each state is liable for an amount proportionate to that part of his working life that a claimant has spent under its legislation. The amount is calculated in the following way. Where a claimant does not qualify for a pension in a member state under its legislation alone, that member state is obliged to aggregate all the periods of insurance and residence properly completed under the legislation of other member states and to calculate the amount that would theoretically be payable by it, were all these periods to have been completed under its legislation.[157] Once this theoretical amount has been determined, the member state then establishes the actual amount of its contribution to the claimant's whole pension pro-rata with the length of the periods completed under its legislation.[158] For example, where a claimant has spent ten out of thirty working years under French legislation, the French authorities must calculate what his pension would be if he had so spent all thirty years. Given that this theoretical amount is, let us say, 3,600 francs per month, the actual French contribution would be ten thirtieths of this sum or 1,200 francs.[159] The other member state or states where the claimant has spent the remaining twenty years of his working life would be liable to make a similar calculation in respect of this period of time. Where, on the other hand, a pension claimant qualifies for a pension in a member state without the need for aggregation, Article 46(1) requires that this member state calculate both the amount due under its legislation alone and the amount that it would have to pay under the aggregation and apportionment procedure of Article 46(2).[160] This article further provides that the higher of these two amounts is the one that must be paid to the claimant.[161] Thus, if in the example given above, the claimant had qualified for a pension of 1,500 francs under French legislation alone, he would have received this amount instead of 1,200 francs. But, if the French national pension had amounted to only 1,000 francs, the claimant would have been entitled to the apportioned amount of 1,200 francs.

There is a further provision in Regulation 1408/71 regarding the calculation of old age and invalidity pensions, which has caused much controversy. This is Article 46(3), which permits a Member State that pays a pension on the basis of Article 46(1) to reduce its contribution where the total amount of the pension received from all liable Member States exceeds what the claimant would have received, were he to have completed all his working life in that Member State. Let us take as an example a person who has worked for ten years in Member State A, five years in Member State B and fifteen years in Member State C. Under the legislation of Member States A and B he is entitled to a pension without the need for aggregation and receives $500 a month from both these states under Article 46(1). For the present let us leave aside the question whether this amount is based on national provisions alone or on the aggregation and apportionment procedure of Article 46(2).[162] Member State C, on the other hand, only accords a pension after thirty years of employment or self-employment, so that aggregation is necessary to determine its contribution. It calculates that the claimant is theoretically entitled to the equivalent of $4,000 per month on the basis of thirty years under its legislation and actually pays him $2,000 for the fifteen years that he did complete. The total amount of the pension is, thus, $3,000 per month, which, let us say, exceeds by $300 the maximum amount of $2,700 that the claimant would have received from either Member State A or B if he had spent all thirty years under their legislation. Accordingly, both states may, pursuant to Article 46(3), reduce their contribution in proportion to their share of all the amounts payable under 46(1). As both states are paying an equal amount, each may reduce its contribution by $150 in order to lower the monthly sum to the permissible maximum of $2,700.

Let us now return to the question of how the pension is paid by Member States A and B under Article 46(1). It will be recalled that, although this provision only applies when a person is entitled to a pension from a member state without the need for aggregation, it nevertheless stipulates that the amount due under the aggregation and apportionment procedure of Article 46(2) must be paid instead of the national amount when it is the higher of the two. Where Article 46(1) in fact leads to the payment of this latter amount, there is no problem with the application of Article 46(3), as the regulation is then being used to reduce a benefit that it itself confers by the procedure set out in Article 46(2).[163] In the example given above Member States A and B would be able to reduce their contributions by $150 without any problem if the monthly payment of $500 was based on aggregation and apportionment.

The position of the Court of Justice is, however, quite different when Article 46(1) leads to the payment of a pension under national law alone and Article 46(3) is used to reduce the amount of this benefit. This, in the Court's view, amounts to using the regulation to deprive a person of a benefit to which he is entitled at national law, which it considers to be inconsistent with the Treaty.[164] And to the extent that Article 46(3), the wording of which makes no distinction between the two methods of calculating a pension under Article 46(1), admits of such use, it has been held by the Court to be of no effect.[165] Thus, in our example, Member

States A and B would not be allowed to reduce their $500 contributions under Article 46(3) if the claimant was entitled to this amount on the basis of their national law alone. This would be so even if the claimant needed to rely on Article 10(1) of Regulation 1408/71 in order to force payment of the contribution outside these states; only where the aggregation and apportionment provisions of the regulation are used to determine the amount payable, does the Court of Justice consider the benefit to arise through the operation of Community law, thus entitling a member state to reduce it pursuant to Community law.[166]

This approach of the Court has been much criticized. Wyatt and Dashwood, for example, take the view that it needlessly favours migrants and suggest that it impedes free movement:

> A legal regime that favours the one over the other no more furthers free movement than export subsidies further free trade.[167]

The Court has met this type of criticism rather tamely by claiming that "no discrimination can arise in situations which are not compatible."[168] Thus stated the Court's reasoning is unconvincing. Although it may be difficult in many other ways to compare the situation of migrants with people who have stayed at home, it is possible to compare the payment under differing circumstances of the same benefit and to decide whether the discrepancy is justified.

There are, however, other reasons for disputing the criticism that has been levelled at the Court. In the first place there may well be a very good reason for the higher total amount of a migrant's pension, namely the higher cost of living - and hence the higher benefits - or the more generous social policy of one or more of the contributing states. It is difficult to see any justification for depriving a person of an advantage merely because another member state is not so expensive or generous.[169] Secondly, there is no logical reason for singling out persons who receive their pensions under national law when a person whose pension is calculated solely by way of the procedure in Article 46(2) could just as easily surpass in a given member state the maximum amount that would have been payable if he had spent all his working life there. Indeed, both these points apply with equal force to the reduction that is permitted under Article 46(3). Thus, if any criticism is due, it should be directed at the Council for inserting Article 46(3) into the regulation rather than at the Court for mercifully limiting its ambit of application.

Another point to be considered when assessing the merit of the Court's refusal to permit Article 46(3) to be used against national pensions is that there is nothing to prevent a member state from providing in its own legislation for a reduction in the amount payable. In this situation it is national law that is taking away a national benefit, which is not inconsistent with the Treaty. This possibility was exploited by the Belgian authorities in Mura (22/77), where a miner received an invalidity pension under Belgian legislation alone and a French invalidity pension exclusively by means of the aggregation and apportionment provisions of Article 46(2). The Belgian authorities reduced his Belgian pension by the amount of the French pension pursuant to Belgian law and Article 46(3). Mura contested the reduction and the matter was referred to the Court of Justice. The Court rejected the use of Article 46(3) in these circumstances but upheld the right of the Belgian authorities to reduce the amount of their pension pursuant to national law.[170] At the same time, however, it pointed out that Article 46(1) stipulates that the amount due under the aggregation and apportionment procedure must be paid where it is higher than the national amount. Thus, if the national reduction provisions reduce the amount of the pension below that obtainable under Article 46(2), they become ineffective as the latter amount must be paid.[171] Such was the case in Mura (22/77). The claimant had worked for eleven years in Belgium and four years in France, so that the apportioned amount payable by Belgium was, according to the Belgian authorities, eleven fifteenths of the national amount,[172] which was less than the reduced national amount. Advocate-General Warner pointed out, however, that ten years was the maximum period required by the Belgian legislation for obtaining the full pension and should be substituted pursuant to Article 46(2)(c) for the aggregated period of fifteen years.[173] By this reckoning the apportioned amount was the full pension and had to be paid under Article 46(1), thus depriving the national reduction provisions of effect. The Court adopted the Advocate-General's argument.

Finally, there is the responsibility for the payment of death grants. Only one member state will be liable to provide this benefit, and in the case of employed or self-employed persons this is the competent state as determined under Articles 13(2) and 14.[174] Persons claiming in respect of principals who were receiving their pension from a single Member State obtain the grant from this state.[175] Where a pensioner was in receipt of pensions from several member states, it is the member state to whose legislation the pensioner was subject the longest that assumes payment.[176] If the pensioner was subject for equal periods of time to the legislation of two or more member states, the last of these states is responsible.[177]

Overlapping Benefits

Introduction. Benefits payable under the social security scheme of a member state can overlap with other financial advantages in three ways: benefits of the same kind can become payable for the same period of insurance; different benefits can accrue from the same contingency; and social security benefits can be supplemented by a source of income. Where overlapping occurs within one national jurisdiction, Community law is not involved as this is a purely internal matter. However, where the overlap concerns two or more member states, this is invariably due to the operation of Regulation 1408/71 and Community law provides a remedy or supplements national remedies.

Identical benefits. National provisions that provide for the reduction of a social security benefit when the recipient is also entitled to an identical benefit under the legislation of another member state or states can be applied according to their tenor subject to two exceptions. They may not be invoked by a member state against its contribution to an invalidity or old age pension that has been calculated according to the aggregation and apportionment procedure of Article 46(2).[178] The rationale for this restriction is quite simply that the possibility of overlap is already taken care of by the apportionment aspect of the procedure.[179] National reduction provisions may also not reduce a benefit below any minimum amount that is set by Community law. In the case of invalidity and old age pensions, for example, the minimum amount payable by a member state is that which is calculated according to Article 46(2), and it must still be paid even though national law provides for a greater reduction.[180]

Where provisions against overlapping identical benefits exist within a member state but do not apply to benefits accorded by other member states, Article 12(2) of Regulation 1408/71 provides for the necessary extension of effect. National provisions that so apply by virtue of Article 12(2) are subject both to the two restrictions mentioned above and to two additional limitations. In the first place they can only be used by a member state against benefits that it is obliged to pay through the operation of Regulation 1408/71. This accords with the Court's oft-repeated assertion that Community law cannot be used to deprive a person of benefits arising exclusively under national law,[181] which assertion was confirmed by the Court of Justice in Kaufmann (184/73) with respect to Article 12(2).[182] Thus, the ability of the Belgian authorities in Mura (22/77) to reduce an invalidity pension that was payable under national legislation alone was due exclusively to the existence of national provisions to that effect; they could not have relied on Article 12(2) to extend the application of national law to a French benefit in these circumstances.

The exact definition of what constitutes a Community benefit permitting the use of Article 12(2) is not clear. In the English case of

Re An Irish Widow (U.K.) the National Insurance Commissioner took the view that only when a benefit arises by way of aggregation and apportionment, does it become a Community benefit susceptible of reduction under Article 12(2). This view is in keeping with the Court of Justice's definition of a Community benefit for the purpose of applying Article 46(3),[183] but it should be borne in mind that the Court has always been anxious to limit the scope of that article. It might well be that a less narrow approach is in order in other situations where there is not the same possibility of a double reduction.[184] It is suggested, therefore, that Article 12(2) should be available whenever a benefit *arises* by way of Community law but not when it merely becomes payable under Article 10(1) of Regulation 1408/71 requiring payment abroad. The specific provisions against overlapping benefits in the regulation support this wider view, as they apply without the need for aggregation and apportionment.[185]

The second limitation concerns the amount of the reduction that is permitted by the combined use of national provisions and Article 12(2). When national law is used alone, the restriction is that the amount not be reduced below a set Community minimum, but when Article 12(2) is needed as a supplement the Court of Justice has decreed that the benefit may only be reduced by the amount actually received. The attempt by the Dutch authorities in *Kaufmann* (184/73) to use Article 12(2) to reduce a Dutch invalidity pension by the total payable amount of a German sickness benefit was therefore rejected; instead they were enjoined to take into consideration only the sum that was paid by the German authorities after the application of German national reduction provisions.[186] This is another instance of the Court acting to prevent a double reduction.

Where no national provisions against overlapping identical benefits exist at all, a Member State may rely on Article 12(1), which contains a general prohibition against such overlap, or on specific provisions in Regulation 1408/71 to this effect. Article 19(2) of the regulation provides that family members residing in a member state other than the competent state only derive a right to sickness and maternity benefits in kind[187] under the legislation of the competent state "in so far as they are not entitled to such benefits under the legislation of the State in the territory of which they are permanently resident." Article 68(2) stipulates that, where unemployment benefits are increased by a member state to take account of family members residing in another member state, the increase shall not apply if in that state of residence another person's unemployment benefits are also calculated by taking into consideration the same family members. In the same vein, Articles 76 and 79(3) provide that the payment outside the competent state of family benefits or orphans' benefits, respectively, may be suspended if similar benefits are payable in the state of residence by virtue of the pursuit by some person of a trade or professional activity. These last two articles are worded rather strangely, as they appear to apply only in the case of benefits arising from self-employed activity. However, in Ragazzoni (134/77) and Rossi (100,78), the Court of Justice indicated that both articles should be interpreted as including benefits arising from employment.

There is a subtle difference in the wording of Article 19(2), on the one hand, which is made applicable only to the extent of the overlap ("in so far as..."), and Articles 68(2), 76 and 79(3), on the other hand, which seem to permit a suspension of the benefit regardless of the amount actually received in the other Member State. Accordingly, in Ragazzoni (134/77) and Rossi (100,78), Belgium suspended the payment of family allowances and orphans' benefits, respectively, because the wives of the

Italian workers concerned were employed in Italy. The Court rejected the validity of the Belgian action on two grounds. The first was that no family or orphans' benefits flowed from the wives' employment, so that Articles 76 and 79(3) were not applicable. The second ground was that, even if the articles had been applicable, Belgium could only have taken into account the benefits actually paid out by the Italian authorities. This is the same limitation that the Court has placed on the operation of Article 12(2) and it may be concluded that it applies as well to Articles 68(2) and 12(1).

The use of Article 12(1) in situations that do not come within the specific provisions mentioned above is subject to all the same restrictions that attach to the use of Article 12(2). This must be so, as they both involve the use of Community law to reduce benefits. Hence, Article 12(1) may not be invoked against pensions that are calculated in accordance with Article 46(2);[188] it cannot be used to reduce a benefit below a Community minimum; it is only applicable by a Member State that is paying a benefit under Community law;[189] and, finally, it only allows a reduction that is equal to the actual amount of the other benefit received by the person concerned.[190]

Different benefits. National provisions that allow a member state to reduce a benefit where the recipient is also receiving another social security benefit from another member state in respect of the same contingency can be applied without restrictions. In particular such provisions may be invoked even against pensions calculated according to Article 46(2), for the prohibition on doing this contained in Article 12(2) only affects benefits of the same kind. Nor are there any set minimum amounts that must be paid under Community law in the face of an overlapping but different benefit.

Article 12(2) of Regulation 1408/71 can also be relied on to extend national provisions against overlapping different benefits to benefits accorded by other member states.[191] This was done by the Dutch authorities in Kaufmann (184/73) in order to reduce an invalidity pension calculated according to Article 46(2) by the amount of a German sickness benefit. But a Member State using Article 12(2) does not have the same freedom of action as one that can rely exclusively on its national legislation. As the Court of Justice pointed out in Kaufmann (184/73), Article 12(2) can only be used to reduce benefits that arise by way of Community law[192] and the reduction it allows is limited to the actual amount of the different benefit that is received.[193] There was no problem with respect to the nature of the benefit in Kaufmann (184/73) as it was calculated according to Article 46(2), but the Dutch authorities were only permitted to reduce it by the amount of the sickness benefit after the application of German national reduction provisions. When Article 12(2) is used to extend national provisions to different benefits from other Member States, it may be used against pensions that are calculated on the basis of Article 46(2).[194] This is indeed how it was used in Kaufmann (184/73).

Social security benefits will only overlap with benefits of a different kind because of the way the various national legislations take effect. It may be that Community law exacerbates the problem by enabling persons to claim benefits in situations where they would not otherwise be able to do so, but it is not the ultimate cause of such overlapping. This is undoubtedly the reason why there are no provisions in Regulation 1408/71 for a reduction of benefits in this situation in the absence of national provisions on the matter.

Income. National provisions permitting a reduction in a social security benefit where the recipient is receiving an income from employed or self-employed activity can operate without restrictions. Where these provisions do not extend to income arising in other member states, Articles 12(2) and (3) can be used to effect the extension. Presumably this extension is only possible to the extent of the income received and where the reduced benefit arises by way of Community law.[195] There is no prohibition in this case against reducing pensions calculated according to Article 46(2).[196] In the absence of any national provisions capable of extension, no action can be taken at Community law against overlapping income.

FOOTNOTES

Chapter 4C

[1] Article 3(2). All citations from Regulation 1408/71 include any amendments brought about by the adoption of Regulation 1390/81 extending social security coverage to the self-employed.

[2] See Chapter 4B, p. 347 and p. 349 and Chapter 3E, pp. 292-294.

[3] Article 7(2) or 12 - see infra, p. 360.

[4] This occurs by way of incorporation of Title IIIA of the general programmes - see Chapter 4B, p. 338.

[5] See Chapter 1, pp. 23-24 for a discussion of when implementing measures are necessary to remove discrimination.

[6] See, too, Palermo (237/78), where a requirement of French nationality for the children of a person claiming a supplementary family allowance was held by the Court to violate Article 3(1).

[7] In his submission to the Court in this case, Advocate-General Trabucchi suggested the use both of the Treaty provisions and Article 8 of Regulation 3 (Article 3 of Regulation 1408/71) - [1976] 2 C.M.L.R. 374 at 381. There seems to be no explanation why the Court chose to rely strictly on the Treaty or indeed why it felt it necessary to use the Treaty at all.

[8] It would seem, however, that the Court will henceforth only use these articles of Regulation 1612/68 where the benefit is social assistance rather than social security and thus falls outside the scope of Regulation 1408/71 by virtue of Article 4(4) excluding social assistance - see infra, pp. 363-365.

[9] The "competent state" is the Member State under whose social security scheme the person concerned is insured.

[10] Regulation 1390/81. Regulation 574/72, which deals with the implementation of Regulation 1408/71, was likewise amended by Regulation 3795/81. Neither of the latter two regulations are discussed in detail as they are concerned with procedures and go beyond the scope of this study.

[11] See Chapter 1, pp. 23-24.

[12] Article 1(a)(i).

[13] Article 1(a)(ii).

[14] Article 1(a)(iv).

[15] Article 1(a)(iii).

[16] *See* the discussion in Chapter 4A, pp. 312-313.

[17] These are defined in Article 1(v) as "any once-for-all-payment in the event of death" exclusive of lump sum benefits paid in lieu of pensions.

[18] These are defined in Article 1(u)(i) as "all benefits in kind or cash intended to meet family expenses...." Family benefits include "family allowances," which are defined in Article 1(u)(ii) as "periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family."

Family benefits really come under family rights but, for the sake of convenience, they are treated in this chapter with the other social security branches.

[19] *See* the discussion of *Gillard* (9/78) in Chapter 4B, p. 346.

[20] This article is the equivalent of Co. Reg. 1408/71, art. 3(1).

[21] This article is the equivalent of Co. Reg. 1408/71, art. 4(2).

[22] This article is the equivalent of Co. Reg. 1408/71, art. 1(t).

[23] [1973] C.M.L.R. 386 at 407.

[24] This article is the equivalent of Co. Reg. 1408/71, art. 4(1)(c).

[25] [1973] C.M.L.R. 386 at 408.

[26] See fn. 20.

[27] [1974] E.C.R. 1251 at 1262.

[28] These cases are discussed in Chapter 4D, pp. 424-425.

[29] *See* *Fiorini* (32/75), where Article 7(2) was used, and *Michel S* (76/72), where Article 12 was used.

[30] Article 10(1) - *see* infra, pp. 374-378.

[31] *See* Chapter 4B, pp. 352-353.

[32] *See* Article 1 (r),(s).

[33] Ibid.

[34] *See* the Preamble to Regulation 1408/71, 7th recital.

[35] Article 67(1) is an exception - *see* *infra*, p. 370.

[36] Article 38(1).

[37] Articles 40(1) and 45(1).

[38] Article 45(1).

[39] Article 64.

[40] Article 67(1), (2).

[41] Article 72.

[42] Article 48(1). See, too, Article 40(1).

[43] Article 46(1). See, too, Article 40(1).

[44] Article 67(3).

[45] This limitation does not apply where the competent state bases entitlement on the completion of employment periods - see Article 67(2).

[46] This case is discussed supra, p. 367.

[47] Article 72, as amended by Regulation 1390/81 to include self-employment.

[48] Article 18 only refers to periods of employment and, unlike Article 72, is not amended by Regulation 1390/81. Article 67(1) and (2) is amended by Regulation 1390/81 to refer specifically to periods of employment completed "as an employed person."

[49] Article 18(1) refers to periods of insurance or residence "completed under the legislation of any other Member State" without any restriction to employed persons.

[50] Article 67(1),(2). Periods of residence can never be aggregated in order to obtain unemployment benefits - see, supra, p. 368.

[51] Article 46(1),(2).

[52] Article 67(4).

[53] Cash benefits are compensation for lost earnings - see Vaassen (61/65).

[54] Article 23(3).

[55] Ibid.

[56] Article 58(3).

[57] Ibid.

[58] Articles 39(4), 47(3).

[59] Article 47(3).

[60] *See* the discussion, *infra*, pp. 391-396.

[61] Articles 68(2), 76 and 79(3).

[62] Articles 73(2), 74(2). The amount of the family benefits is, however, determined by French legislation with respect to family members who accompany a person subject to French legislation on a temporary posting from France to another Member State - *see* Article 73(3).

[63] Article 23(1),(2).

[64] Article 58(1),(2).

[65] Article 68(1).

[66] Ibid.

[67] *See* Article 47(1),(a) to (d).

[68] *See* Articles 47(1)(a) and 47(1)(c):

47(1)(a): where, under the legislation of a Member State, benefits are calculated on the basis of an average wage or salary, an average contribution, an average increase or on the ratio which existed, during the insurance periods, between the claimant's gross wage or salary and the average wage or salary of all insured persons other than apprentices, such average figures or ratios shall be determined by the competent institution of that State *solely on the basis of the insurance periods completed under the legislation of the said State, or the gross wage or salary received by the person concerned during these periods only* (emphasis added);

47(1)(c): where, under the legislation of a Member State, benefits are calculated on the basis of wages or salaries or of lump-sum payments, the responsible institutions of that State shall consider the wages or salaries or lump-sum payments to be taken into account in respect of periods of insurance or residence completed under the legislation of other Member States *as equal to the wages or salaries or lump-sum payments or, where appropriate, to the average of the wages or salaries or lump-sum payments corresponding to the insurance periods completed under its own legislation* (emphasis added).

[69] Articles 38(2),(3); 45(2),(3).

[70] Ibid.

[71] Ibid.

[72] In *D'Amico* (20/75), however, an Italian worker was denied an early retirement pension under German law because he failed to meet the prerequisite of availability to a German employment office for the year

prior to retirement. During this period he was unemployed in France, but the Court of Justice did not consider that this fact dispensed him from compliance with the German prerequisite or that availability to a French employment office was an acceptable substitute. The Court based its decision on Article 67(3) of Regulation 1408/71, which obliges a member state to aggregate periods of time spent in other member states for the purposes of establishing entitlement to unemployment benefits only where a person has been subject to its legislation immediately prior to claiming the benefit. The problem with the Court's approach in D'Amico (20/75) - apart from its rather odd assimilation of a retirement benefit to unemployment benefits - is that, although Article 3(1) is subject to any contrary provisions in the regulation, it interprets a dispensation from aggregation as permission to set up a discriminatory prerequisite. It is suggested, therefore, that the case was wrongly decided.

[73] Cf. Mazzier (39/74), where the Court of Justice based the prohibition of a similar condition relating to an invalidity benefit on Article 3(1).

[74] Articles 56 and 65(1) respectively.

[75] Articles 45(4),(5),(6).

[76] This is the phrase used in Article 10(1) - see supra.

[77] [1974] 1 C.M.L.R. 620 at 634.

[78] For "cash benefits" see fn. 53. "Benefits in kind" are health payments and reimbursements therefor - see Vaassen (61/65).

[79] See Articles 19(1), 22(1), 52, 55(1).

[80] Articles 36(1), 63(1).

[81] Articles 36(3), 63(3).

[82] Articles 22(1)(a), 55(1)(a).

[83] Articles 22(1)(c), 55(1)(c).

[84] This will be the competent state where the sick person resides in that state, but it should be noted that a person may be covered by the legislation of one member state and yet reside in another member state. Where a person resides permanently outside the competent state, he must still obtain the authorisation from that state even though it is the state of residence that is actually providing the benefits pursuant to Article 19(1) and 52 - see infra, pp. 375-376.

[85] Article 22(2), paragraph 2 as amended by Regulation 2793/81.

[86] Article 22(2), paragraph 2 was originally couched in these terms. Article 55(2), paragraph 2 concerning cash benefits and benefits in kind resulting from an accident at work or an occupational disease still retains this form as it is not amended by Regulation 2793/81.

[87] See Pierik (117/77).

[88] As regards a return to the state of residence, see fn. 84.

[89] Articles 22(1)(b), 55(1)(b).

[90] Articles 22(2), 1st. para. 55(2), 1st para.

[91] Article 69(1)(a).

[92] Article 69(1)(c).

[93] Article 69(3).

[94] Article 69(1)(c).

[95] Article 69(2).

[96] Pursuant to Article 70(1), paragraph 1.

[97] Pursuant to Article 70(1), paragraph 2.

[98] See Article 69(1)(a).

[99] [1975] E.C.R. 971 at 979.

[100] Article 75(1)(a).

[101] Article 75(1)(c).

[102] Article 75(1)(b).

[103] Article 75(1)(b),(c).

[104] See fn. 60.

[105] Article 75(2)(b).

[106] Article 75(2)(a).

[107] Article 75(2)(c).

[108] There is one exception. Under certain circumstances a person who is simultaneously employed in one member state and self-employed in another member state, can be subject to the legislation of each of these member states as regards the activity pursued in its territory - see 14c(1)(b).

[109] This general rule will govern whenever the member state whose legislation is applicable in derogation from the rule does not apply it. In Selestat (8/75) a band resident and employed in Germany gave three performances in France. According to Article 13(1)(c) of Regulation 3 (Article 14(2)(b)(i) of Regulation 1408/71) the band was subject to German

legislation in respect of these performances, but the German authorities did not require payment of the necessary social security dues from the band's French employers. The Court of Justice held that under these circumstances the law of France, being the state of employment, would apply by default and that the dues should be paid to the French authorities.

[110] Articles 14(1)(a), 14a(1)(a).

[111] Articles 14(1)(b), 14a(1)(b). The period cannot, however, exceed a total of twenty-four months.

[112] Article 14(1)(a).

[113] This article is the equivalent of Co. Reg. 1408/71, art. 14(1).

[114] 1971 C.M.L.R. 222 at 234.

[115] See Chapter 2A, pp. 73-76, Chapter 2B, p. 108.

[116] Articles 14(2)(b)(i), 14a(2).

[117] Article 14a(2).

[118] Article 14(2)(b)(ii). Where the employee has several employers who have registered offices or places of business in different member states, he will continue to be subject to the legislation of the member state of his residence - see Article 14(2)(b)(i).

[119] See Chapter 2A, pp. 73-74, Chapter 2B, p. 108.

[120] Regulation 3 stipulated which Member State would apply its legislation in a given situation without spelling out the ensuing implication that only one legislation would apply to one and the same period. This implication is set out expressly in Article 13(1) of Regulation 1408/71.

[121] See Moebs (92/63) and van der Vecht (19/67).

[122] See Moebs 92/63, [1964] C.M.L.R. 338 at 348.

[123] [1977] E.C.R. 815 at 822.

[124] Ibid.

[125] Derrick Wyatt and Alan Dashwood, The Substantive Law of the EEC (London: Sweet and Maxwell, 1980) at pp. 169-170 also remark on this ambiguity.

[126] See Moebs, 92/63, [1964] C.M.L.R. 338 at 348.

[127] Articles 19(1) and 22(1) state this expressly. It is implied by Articles 52 and 55 in that they do not curtail the application of the legislation of the competent state in this regard.

[128] For a definition of "cash benefits" see fn. 53.

[129] Articles 19(1)(b), 22(1)(ii), 52(b), 55(1)(ii). By agreement between the competent State and the member state of residence or stay, these cash benefits may be provided by the latter according to the legislation of the competent state. Such an agreement would presumably also deal with the question of reimbursement.

[130] See fn. 78.

[131] Articles 19(1)(a), 22(1)(b)(i), 52(a), 55(1)(b)(i).

[132] Articles 22(1)(a)(i), 55(1)(a)(i).

[133] Articles 22(1)(c)(i), 55(1)(c)(i).

[134] Articles 36(1), 63(1).

[135] Articles 19(1)(b), 22(1)(ii), 52(b), 55(1)(ii) - see, too, fn. 129.

[136] Articles 22(1)(a)(i), 55(1)(a)(i).

[137] Articles 22(1)(c)(i), 55(1)(c)(i).

[138] Articles 22(1)(b)(i), 55(1)(b)(i).

[139] Articles 19(1)(a), 52(a).

[140] Articles 20, 53.

[141] Article 1(b).

[142] Article 70(1), 1st paragraph.

[143] This is not clearly stated in Regulation 1408/71, but Article 83(1)(a) of Regulation 574/72 establishes that this is the case.

[144] Article 70(1), 2nd paragraph.

[145] See Articles 73(1), 74(1), 75(1).

[146] See Articles 73(1), 74(2), 75(2)(a) and (b). France will, however, be responsible under Article 75(1) for providing allowances to non-resident families that are covered by its legislation pursuant to Article 73(3) - see fn. 62.

[147] Article 75(2)(c).

[148] Articles 73(2). Although self-employed persons are entitled to family benefits pursuant to Article 72, none of the rules concerning non-resident family members apply to them. This is an odd situation, as the effect is to deny self-employed persons the right to have non-resident family members taken into consideration.

[149] Article 57(1).

[150] Article 57(3).

[151] Article 39(1),(2).

[152] Article 39(3).

[153] Article 39(1),(3).

[154] Theoretically the invalid could qualify under Article 39(3) for benefits in more than one other state. Presumably the most recent state would be responsible and the other states could use Article 12(1) against overlapping benefits - see infra, pp.391-395.

[155] Article 40(1). Pursuant to Article 40(2), however, claimants who have been subject to a combination of legislations will receive their benefits exclusively from one member state where:

a) they suffer incapacity followed by invalidity while subject to a legislation that calculates the amount of the benefit independently of the length of coverage;

b) they satisfy the conditions for entitlement under such legislation without the need to take into account periods completed under the other type of legislation; and

c) they do not qualify for benefits under a legislation of the other type.

[156] Article 46 subject to Article 48(1). However, if under the legislation of a member state entitlement to a pension arises within one year, that member state is liable to contribute under Article 46 - see Article 48(1).

[157] There are some possible modifications to this system. Article 46(2)(a) provides that where the benefit payable under the legislation of a member state is independent of the periods completed, this amount is substituted for the theoretical amount. Similarly, Article 46(2)(c) stipulates that where the length of the aggregated periods is longer than the maximum period required by a member state for receipt of the full benefit, the latter period is used instead.

Where a person has spent less than a year in a member state that is not liable to contribute (see fn. 156), the contributing states must nevertheless take this period into account for the purpose of aggregation - see Article 48/(2).

[158] Article 46(2)(b).

[159] The modifications referred to in footnote 158 would operate as follows. If the amount payable under French legislation is a fixed sum of 3,000 francs, this would be considered the theoretical amount (Article 46(2)(a)), and the French authorities would be liable to pay only 1,000 francs. If fifteen years is the maximum period required to obtain the full benefit under French law, this figure would be substituted for the

total aggregated periods of thirty years (Article 46(2)(c)), and the French authorities would be liable to pay 2,400 francs in the original example.

[160] Paragraphs 1 and 2.

[161] Paragraph 2.

[162] Under Article 46(1), when a claimant is entitled under national legislation alone, he will nevertheless receive the amount due under Article 46(2) if it is higher than the national amount.

[163] The use of Article 46(3) to reduce such benefits was suggested by Advocate-General Warner in Strehl, 62/76, [1977] 2 C.M.L.R. 743 at 745-751. The Court of Justice did not expressly accept the suggestion in that case as the payment at issue was due under national legislation alone, but it subsequently confirmed the Advocate-General's approach in Manzoni, 112/76, [1978] 2 C.M.L.R. 416 at 153 and Giuliani, 32/77, [1978] 2 C.M.L.R. 416 at 453-454.

[164] See Petroni, 24/75, [1975] E.C.R. 1149 at 1162; Strehl, 62/76, [1977] 2 C.M.L.R. 743 at 753-754; Manzoni, 112/76, [1978] 2 C.M.L.R. 416 at 453-454.

[165] Ibid.

[166] Giuliani, 32/77, [1978] 2 C.M.L.R. 416 at 458.

[167] Wyatt and Dashwood, op. cit., at p. 176. The analogy is somewhat absurd, for the additional advantage that may accrue to migrants can hardly be characterised as a disincentive to personal mobility, whereas export subsidies directly hamper free trade.

[168] Mura, 22/77, [1978] 2 C.M.L.R. 416 at 454.

[169] See the remarks of Advocate-General Warner in Strehl, 62/76, [1977] 2 C.M.L.R. 743 at 751, where he advances this very point in justification of the Court's approach.

[170] [1978] 2 C.M.L.R. 416 at 456.

[171] [1978] 2 C.M.L.R. 416 at 456. See, too, Schaap (98/77) and Boerboom (105/77).

[172] Pursuant to Article 46(2)(a) the national amount was taken as the theoretical total of the aggregated amounts - see fnn. 157 and 159.

[173] See fnn. 157 and 159.

[174] Article 65(2).

[175] Articles 66 and 28(2)(a).

[176] Articles 66 and 28(2)(b).

[177] Ibid.

[178] Article 12(2), last sentence. See, too, Mura, 22/77, [1978] 2 C.M.L.R. 416 at 456. In the Mura case (22/77), however, it was possible to invoke the national reduction provisions against an invalidity pension, as it had been calculated on the basis of national law alone - see, supra, pp. 389-390.

[179] Article 46(3) nevertheless provides for a reduction by the contributing member state under certain circumstances - see supra, pp. 386-388. It thus permits both an apportionment and a reduction, which is the very situation that Article 12(2) seeks to avoid.

[180] This was the case in Mura (22/77) - see supra, pp.

[181] See Petroni, 24/75, [1975] E.C.R. 1149 at 1162; Strehl, 62/76, [1977] 2 C.M.L.R. 743 at 753-754; Manzoni, 112/76, [1978] 2 C.M.L.R. 416 at 453-454.

[182] [1974] E.C.R. 517 at 525.

[183] See supra, p. 388.

[184] See fn. 179.

[185] These provisions are discussed infra, p. 394.

[186] [1974] E.C.R. 517 at 527.

[187] See fn. 78. Cash benefits (see fn. 53) are not relevant here, as they pre-suppose employment and an autonomous right to benefits under the state of employment.

[188] Article 12(1), last sentence.

[189] Article 12(1) refers to benefits conferred by the regulation. For a definition of Community benefits in this context, see the discussion supra, p. 393.

[190] See the discussion above.

[191] Unlike Article 12(1), Article 12(2) applies to all overlapping benefits.

[192] [1974] E.C.R. 517 at 525.

[193] [1974] E.C.R. 517 at 527.

[194] The prohibition against the reduction of such pensions in Article 12(2) only applies in the case of the same benefits.

[195] These two principles accompany all other Community reduction provisions, and despite a lack of judicial opinion on the point there would seem to be no reason to make an exception here.

[196] Article 12(3) on self-employed income specifically refers to a reduction in this situation. Article 12(2) only prohibits a reduction of the pensions where they overlap with a similar benefit from another member state.

Chapter 4D

FAMILY RIGHTS

INTRODUCTION

The Derivative Nature of Family Rights

No mention has yet been made of the position of the families of migrant workers and self-employed persons in this study of personal mobility rights. This omission was deliberate, for, unless family members are also moving to look for work or are actually working, no such rights accrue to them in a personal capacity. Where the family are merely following an employed or self-employed person, their rights are derivative and flow exclusively from the latter's right to equal treatment in the host state. This is particularly the case with non-E.E.C. family members, who can never enjoy personal rights under the Treaty. Thus, in Ayub (U.K.), the Pakistani husband of a British woman was denied entry into the United Kingdom because his wife had not severed her connection with her home country and did not enjoy a right to equal treatment at Community law.[1]

The derivative nature of family rights is clearly manifest in both the primary and secondary legislation of the Community. The Treaty, apart from a reference to "dependants" in Article 51, confers no direct rights on the family. As for the secondary legislation, it reiterates time and again that the rights flow from the principal.[2] Thus, the fifth recital to the Preamble of Regulation 1612/68 states that "in order that [the right of freedom of movement] may be exercised...in dignity and freedom, [it] requires that equality of treatment shall be ensured...and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family...."[3] Similarly, the Preambles to both Directive 75/34 and Regulation 1251/70 recognize that the right of the principal to remain in the host state after reaching the end of his working life "entails extension of such right to the members of his family;"[4] and, in the body of the legislation, family members are given the right to remain if they reside with a principal who has first acquired the right himself.[5] The definition of "member of the family" in Regulation 1408/71 on social security provides a final example in that it relates the definition of the term to the legislation under which the principal is receiving his benefit.[6]

The Court of Justice has also emphasised the derivative nature of family rights at the same time as expanding their scope. Nowhere is this more evident than in Fracas (7/75) and Inzirillo (63/76), where the Court bases its wide interpretation of family rights under the Community social security legislation squarely on the principal's right to equality.[7]

The Extent of Family Rights

Although family rights derive from the principal's right to equality, they are not merely derivative in their actual exercise. In the first place they are not restricted to benefits that arise solely by virtue of the principal's employment or self-employment. This can be seen in Fracas (7/75), where the issue was the entitlement of the child of an Italian worker to a Belgian grant for the handicapped payable independently of periods of insurance or employment. The Court of Justice decided that the grant came under the rubric of social security,[8] and the question arose whether a family member could share the principal's eligibility for a social security benefit that did not flow from his contract of employment. The

Court ruled that the child had as much right as the worker to complete equality of treatment in the host state under Regulation 1408/71 and was, therefore, eligible for the grant.[9] Likewise, in Fiorini (32/75), the spouse and children of an Italian worker were held to be entitled to share his right to a fare reduction card on the French national railways under Article 7(2) of Regulation 1612/68 even though it did not arise from his contract of employment.[10]

The second point to be made is that the general family right to benefits set out in Fracas (7/75) and Fiorini (32/75) is not limited either to benefits in which the principal must also share. The contrary may have been the case in Fracas (7/75) as the grant possibly helped alleviate the principal's financial responsibilities, but in Fiorini (32/75) the principal was deceased and beyond any financial assistance. The rights that the family possessed in the latter case were therefore necessarily quite independent of the principal, as the Court makes clear:

> It would be contrary to the purpose and the spirit of the Community rules on freedom of movement for workers to deprive the survivors of such a benefit following the death of the worker whilst granting the same benefit to the survivors of a national.[11]

The rights granted by Regulation 1612/68 to non-E.E.C. family members to pursue a livelihood[12] and to the children of migrant workers to be admitted to the educational and other equivalent facilities of the host state[13] are other examples of such independent rights. So, too, are the rights of surviving family members. Both Directive 75/34 and Regulation 1251/70 grant a right to remain permanently in the host state to family members whose principal has died before acquiring the right for them.[14] Article 2(1) of Regulation 1408/71 extends the application of the special social security arrangements to survivors of principals on a general basis, and other articles of the regulation provide for their entitlement in specific cases.[15] The Court, too, has not hesitated to affirm the rights of survivors. In Michel S. (76/72) and Casagrande (9/74), for example, it applied the provision on education rights in Regulation 1612/68 to the children of deceased workers. More significant still is the Court's decision in Fiorini (32/75), where it not only upheld the extension to survivors by Article 7 of Regulation 1251/70 of all family benefits arising under Regulation 1212/68[16] but, as we have seen, also accorded surviving family members an independent right to equality based on the Treaty.[17]

It is permissible to conclude, then, that the members of a principal's family enjoy complete equality with nationals of the host state.[18] They are not restricted to benefits that flow directly from the principal's employment or self-employment or, indeed, to those that the principal may also enjoy; nor do they lose any advantage by reason of the principal's death. In short their equality rights can be exercised autonomously despite their ultimate derivation from the principal. In Fracas (7/75) the Court used Article 7 of the Treaty to bolster this wide view of family rights,[19] but that was not necessary. As was pointed out earlier in this study,[20] there is no need for recourse to Article 7 to establish equal treatment in the area of personal mobility as the right flows from the inner logic of Article 48 to 66.[21] In the case of family rights it is clear that there cannot be true equality of treatment for the principal if his family does not also enjoy complete equality during his lifetime and the guarantee of its continuance after his death. As the Council has stated in the Preamble to Regulation 1612/68, personal mobility requires "the integration of the family into the host country."[22]

The Source of Family Rights

Some of the rights of the families of employed persons are to be found in the secondary legislation, but there is no comprehensive provision for their equal treatment. The families of self-employed persons, on the other hand, are possibly protected by the general prohibition contained in the first paragraph of Title IIIA of the general programmes of any measures that are a discentive to free movement.[23] But they are afforded fewer specific rights, both the general programmes and the directives being quite silent on the matter. However, since the Treaty is now directly effective, any deficiencies in the secondary legislation can be remedied by direct recourse to it.

SPECIFIC FAMILY RIGHTS

Right to Entry and Residence

Family members enjoy the same rights of entry and residence as their principal.[24] Although there is no provision for the withdrawal from them of the right of residence, it follows from its derivative nature that it cannot survive the principal's loss of the right. Family members are, of course, subject to the public order exception in the Treaty, but they are also protected by Directive 64/221 that governs its use with respect both to the initial entry and residence[25] and to their right to remain in the host state.[26] The right to remain itself can be acquired through the principal[27] or independently in the event of his death.[28] In the latter case it can only be obtained if a) the principal had resided continuously in the host state for at least two years prior to his death,[29] or b) the principal's death resulted from an accident at work or an occupational disease,[30] or c) the surviving spouse is a national of the host state or lost the nationality of that state as a result of the marriage.[31]

In order to obtain a residence permit or a right of abode, family members must produce their travel papers[32] and adduce proof of the family relationship[33] together, where appropriate,[34] with proof that they are dependent on the principal or lived under his roof in the member state of origin.[35] Directive 68/360 specifies with regard to employees' families that in both cases proof must be in the form of a document issued by the authorities of the member state of origin.[36] Directive 73/148 requires the families of self-employed persons only to prove the pertinent facts to its satisfaction.[37] As in the case of the principal, the right to remain in the host state must be exercisable without any particular formality.[38]

The rights of entry and residence apply equally to family members that do not have the nationality of a member state.[39] However, the host state may require them to obtain visas,[40] in which case they must be afforded every facility for doing so[41] and cannot be required to pay for them.[42] Non-E.E.C. family members have a right to a residence permit with the same validity as that of the principal.[43]

Employees who wish to install their family in the host state are obliged to provide for them housing that is considered "normal for national workers in the region where he is employed."[44] To prevent abuse of the provision, the regulation also stipulates that it cannot be used to discriminate against non-nationals.[45] A host state could not, for example, hold non-nationals to very strict standards whilst turning a blind eye to the housing conditions of nationals. All the same, the provision is somewhat offensive, as it is so clearly aimed at preventing migrants from southern Europe from living in large family units where it is not the custom to do so. Despite the caution against discrimination, this housing requirement is probably a powerful discentive to free movement within the Community and, as such, contravenes the spirit if not the letter of the Treaty.[46] There is no similar provision with respect to self-employed persons.

Right to Pursue a Livelihood

A distinction must be made with respect to the right to pursue a livelihood between family members who possess the nationality of a member state and those who do not. The former enjoy the same right as all E.E.C. nationals to seek and obtain employment and to establish themselves in a self-employed capacity in the host state. It is a personal right that does not derive from the principal. Non-E.E.C. nationals, on the other hand, are not able to benefit from the Community provisions on personal mobility and derive their right to pursue a livelihood exclusively from their principal's right to equal treatment; it is an aspect of the complete equality that the principal may expect for his family in the host state.

The right itself is conferred explicitly by Article 11 of Regulation 1612/68. The provision appears to be directed at both E.E.C. and other nationals,[47] but it has no relevance for the former, who do not need it. The wording of the article is restrictive. Only principals that are actually pursuing an activity as an employed or self-employed person may bestow the right on their family, and the right itself extends only to paid employment for the spouse and children under twenty-one or dependent. The first limitation is acceptable, as a principal can hardly claim a right to work for his family before he has obtained employment himself. There is, however, a problem where the principal has retired or dies leaving his family with a right to remain in the host state. Article 7 of Regulation 1251/70 protects the right to pursue a livelihood under such circumstances for the family of a former employee, but Directive 75/34 contains no similar provision with respect to the families of self-employed principals. This is presumably an oversight, but, short of a very broad interpretation of the directive,[48] the family of a self-employed person will have to rely on the Treaty for the appropriate protection. The second limitation would seem to contravene the Treaty, for the equal treatment to which the family is entitled surely means that all relatives of the principal residing through him in the host state should have the right to engage in both employed and self-employed activity. It is difficult to see a justification for making a distinction between the two types of activity or for favouring the spouse and children. It is suggested, therefore, that the family members excluded by Article 11 and all of them who wish to work for themselves can base their rights directly on the Treaty.

It is noteworthy that Article 11 applies to the families of both employed and self-employed persons despite the fact that Regulation 1612/68 is issued pursuant to Treaty Article 49 dealing with the free movement of workers. This indicates that the Council viewed Article 11 as giving non-E.E.C. family members a personal right to employment rather than as specifying a right that flows from their principal. Thus it felt justified in limiting the right to the spouse and children and obliged to respect the confines of Regulation 1612/68 by excluding self-employment. The unfelicitous result of this muddled thinking has already been discussed. As it matters little in practical terms whether a non-E.E.C. national can work pursuant to a personal or a derivative right, and as the idea of a personal right to work for persons whose very presence in the host state depends on someone else is fundamentally illogical, it seems preferable to ignore what may have been the Council's attention in promulgating Article 11. This leaves the question whether a derivative right to paid employment for non-

E.E.C. family members of self-employed persons can properly be conferred under the authority of Article 49, but, in the face of the direct effect of the Treaty, the problem has little real significance.

Right to Equal Treatment

Family members have a right to equal treatment in the host state deriving from their principal's own right to equality. As the Court of Justice made clear in Fiorini (32/75), it is a general right that is not limited either to benefits that flow from the principal's employment or to benefits in which he also shares.[49] It is, in fact, coextensive with the right to equality of the principal except that it cannot give rise, in its turn, to derivative rights. E.E.C. family members will, of course, possess in addition a personal right to equal treatment in matters affecting employment.

Neither the Treaty nor the secondary legislation are particularly helpful with respect to family equality rights. Both the Treaty and the general programmes and directives on self-employed activities are quite silent on the matter, and the only provision in Regulation 1612/68 on the free movement of workers that relates unequivocably to family members is Article 12, which deals with educational rights. This provision is supplemented by Directive 77/486, and there is also Directive 80/1263 on the exchangeability of driving licenses. What is missing is a comprehensive guarantee of equal treatment, for Article 7(2) of Regulation 1612/68 appears to limit the general right to social and tax advantages to those that accrue to the principal from his contract of employment.

Let us deal first with the specific provisions on family equality rights. Article 12 of Regulation 1612/68 guarantees the right of children of non-nationals to be admitted to the host state's general educational, apprenticeship and vocational training courses "under the same conditions as the nationals of that State." The Court has applied this provision very liberally. In Casagrande (9/74) it used Article 12 to oblige the Bavarian authorities to make an education grant available to the child of an Italian national, arguing that "same conditions" implies a right to the same facilitation of educational attendance.[50] The Court went even further in Michel S (76/72) and construed Article 12 as conferring a right to a grant for handicapped persons. It argued, somewhat disingenuously, that no conclusion to the contrary could be drawn from the failure of the Council to mention such grants in Article 12 as it obviously could not have included all possible hypotheses.[51] This reasoning carefully obscures the difference in kind between educational grants and those for handicapped persons.[52]

Despite the Court's liberal attitude, Article 12 remains restrictive. It applies only to the children of non-nationals, which means that a grandchild or an ascendant relative will have to rely on the Treaty to found his right of admission to the educational facilities of the host state. So, too, will family members of a self-employed principal, who are all excluded from the operation of Article 12. The article does, however, apply to the children of employed principals who have retired or died.[53]

The educational rights granted by Article 12 are complemented by the provisions of Directive 77/486. This later directive confers on children of non-nationals who are or have been employed in a member state the right to free tuition in order to facilitate their integration into the school system of the host state.[54] Such tuition is to include the teaching of the, or one of the; official languages of that state.[55] In addition, member states are obliged under the directive to promote, in cooperation with the member state of origin, the teaching of a child's mother tongue and culture.[56] Unfortunately, this directive also applies only to the children of paid employees.[57] Theoretically this deficiency in scope is a serious flaw, as it is by no means certain that it can be remedied by direct recourse to the Treaty; the facilities provided by the directive appear to go beyond the abolition of discrimination and to constitute positive steps to aid the integration of the family.[58] In practical terms it is difficult to envisage a member state denying these facilities to a non-national child on the technical ground that he is the scion of a self-employed principal. Nevertheless, it is lamentable that the Council has made such discrimination even a remote possibility.

Finally, mention should be made of Directive 80/1263 on the exchangeability of driving licences within the Community. Under Article 8 of this directive, anyone in possession of a national or Community driving licence issued by a member state who moves to another Member State may exchange it for a valid licence in the host state. No stipulation is made as to the holder of the licence, so that any family member may rely on the directive in the same way as their principal.

The Court's approach towards establishing a basis for a comprehensive right to equality for family members encompassing all the social and tax benefits available in the host state is susceptible of criticism. Given that Regulation 1612/68 only applies to employed persons, it might have been wiser for the Court to base this right exclusively on the Treaty in order to place all family members in the same legal position. However, it chose instead to rely on a broad interpretation of Article 7(2) of Regulation 1612/68 in the case of family members of employed principals and to leave the families of self-employed principals alone to the direct protection of the Treaty.

The evolution of the Court's attitude towards Article 7(2) of Regulation 1612/68 is interesting. In Michel S (76/72) it refused to use the article as a basis for awarding a grant for handicapped persons to the son of an Italian worker,[59] stating categorically that it applied only to those benefits "which, being connected with employment, are to benefit the workers themselves."[60] In view of this judicial pronouncement it was a little surprising that the plaintiff in Fiorini (32/75) chose to found her claim to a fare reduction card for herself and her children on this article, for the benefit was not connected with the principal's employment and the principal, being dead, could obtain no benefit from it. Nevertheless, the Court did accept the claim and ignored its previous decision in Michel S (76/72). It rejected the need for any link with the principal's employment as a prerequisite for the application of Article 7(2)[61] and established for family members an autonomous right to its use, which it based on their right to equal treatment under the Treaty:

> It would be contrary to the purpose and the spirit of the Community rules on freedom of movement for workers to deprive the survivors of such a benefit following the death of the worker whilst granting the same benefit to the survivors of a national.[62]

That the Court is talking here of an autonomous family right to social (and tax) advantages is made even clearer by its reference to Article 7 of Regulation 1251/70 as an additional ground for its decision.[63] This article grants to family members with a right to remain in the host state all the equality rights that they enjoy under Regulation 1612/68, and by relating it to the social benefits available under Article 7(3) of this latter regulation the Court is assuming that such benefits are among those to which the family members have an autonomous right.[64] The Court thus goes further than Advocate-General Trabucchi, who, in his submission to the Court in Fiorini (32/75), had suggested that it merely distinguish the Michel S decision (76/72) on the basis that a fare reduction card, unlike a grant for a handicapped son, entails an indirect benefit for the principal by reducing his financial responsibilities.[65] It is to the Court's credit that it preferred to contradict its earlier decision rather than follow this specious reasoning. For it is absurd to talk of an alleviation of responsibility in the case of a deceased person, and it is also a moot point whether the fare reduction card in Fiorini (32/75) was any more of an indirect benefit to the principal than the grant in Michel S (76/72).

The Fiorini decision (32/75) was carried to its logical conclusion in Inzirillo (63/76) when the Court mentioned Article 7(2) as an alternative basis for granting the very benefit that it had refused to the family member in Michel S (76/72) on the basis of that article.[66] As a result of Fiorini (32/75) and Inzirillo (63/76) it is now possible to conclude that the family members of employed principals may henceforth found a general right to equal treatment on Article 7(2). Family members of self-employed principals, however, must rely on the Treaty.

Right to Special Social Security Arrangements

Nature of exercise of family rights. As with all rights that accrue to family members in the host state qua family members, the right to benefit from the provisions on Regulation 1408/71 on social security derives from their principal. Accordingly, Article 1(f) of the regulation provides that the term "family members" is to be defined by the national legislation under which the principal is insured. At the same time, however, this derivative right to social security benefits should be capable of the same autonomous exercise as other family rights.[67] This principle, in turn, is enshrined in Article 3(1) of the regulation giving all beneficiaries of its provisions, which pursuant to Article 2(1) includes family members, the right to all the social security benefits available to nationals.

The Court of Justice has confirmed both the derivative nature and the autonomous exercise of family social security rights. In Vaasen (61/65), for example, it held that the prohibition against suspending payment of a benefit outside the competent state applies to a family member even after the principal's death; the protection afforded by Regulation 3, the predecessor of Regulation 1408/71, was, in the Court's view, available to a family member without any reference to the principal from which it derived.[68] Later, in Mazzier (39/74) and Fracas (7/75), the Court upheld the right of family members to benefits that were unconnected with the principal's employment for the same reason; having derived a right to social security benefits from the principal, this right could be exercised to the fullest possible extent.[69] Its exercise was not restricted to benefits that accrued solely from the principal's employment. By contrast, in Kermaschek (40/76), the Court refused to permit the Yugoslav wife of an E.E.C. national to claim unemployment benefits in Germany through the process of aggregating her employment periods in the Netherlands.[70] In this case the family member concerned did not derive any right to these benefits as they were inextricably linked by German legislation to employment, and hence she had no derivative right capable of autonomous exercise.[71] The same result would obtain in the case of invalidity benefits or benefits resulting from an accident at work or an occupational disease, which are also normally linked to employment and thus not capable of enuring derivatively to family members.[72] Of course, if the wife has possessed the nationality of a member state, she would have had a personal right to aggregation for the purpose of obtaining unemployment benefits.[73]

The Court has also had to deal with the fundemental conflict between Article 3(1), which grants family members all the social security rights that they are capable of deriving from their principal, and Article 1(f), which permits member states to define the term "family members" and thereby to exclude from any benefit those persons who are not so defined. Both the Mazzier (39/74) and Fracas (7/75) cases concerned a grant for handicapped persons that was payable under Belgian legislation only to nationals. The grant was characterised by the Court as social security invalidity benefits[74] and should therefore have been available to non-national family members by way of Article 3(1) of Regulation 1408/71. However, the Belgian authorities argued that, as the legislation in question did not specifically mention family members as beneficiaries, no right to the grant derived to them. The Court rejected this argument. In the first place it pointed out that the grant was payable independently of any employment so that, unlike a normal invalidity pension, it was a benefit that family members were capable of deriving from their principal.[75] It then went on to interpret Article 3(1) as giving family members an absolute right to all derivable social security benefits in the host state that could not be taken away by a member state failing to make provision for family entitlement in its legislation.[76] In Inzirillo (63/76), where the French legislation in question actually excluded non-national family members from the same type of invalidity grant as was at issue in the two previous cases, the Court took the logical next step. It held that Article 3(1) would still operate to make the grant available to the son of a non-national employee notwithstanding the national provision to the contrary.[77] This case betokens the complete emasculation of Article 1(f) and effectively replaces national discretion to determine which social security benefits will derive to family members with the wider Community rule that all except those benefits inextricably linked to employment will so derive. This, it is suggested, accords with the evolution of Community law in the other areas of family rights. The rule would not,however, avail someone in the position of the wife in Kermaschek (40/76), for there the benefit was linked to employment. This causes no hardship, for Community law cannot be expected to place non-national family members in a more favourable position than their national counterparts.

Payment of family benefits. Responsibility for the payment of benefits to family members falls, generally speaking, upon the member state or states that are liable in respect of the principal. Thus, survivors of pensioners and family members who die are entitled to a pension or a death grant, respectively, according to the same rules as operate for their principal.[78] Some amplification is needed, however, in the case of sickness and maternity benefits and family benefits.

Family members resident outside the competent state who require benefits in kind with respect to sickness or maternity, will have them provided, like their principal, on behalf of the competent state by their member state of residence according to its legislation.[79] If the latter state bases entitlement to these benefits on residence alone, the principal's competent state still remains ultimately liable unless the spouse is pursuing a professional or trade activity where he or she resides.[80] A fortiori, the Member State of residence is solely responsible if the resident spouse is employed or established there in a full-time self-employed capacity.[81] Families of frontier workers may also obtain benefits in kind in the territory of the competent state, but this is not the absolute right that it is for the principal;[82] the benefits are only available in an emergency pursuant to an agreement between the competent state and the state of residence or with the prior authorisation of the competent state.[83] Family members do not have a right to cash benefits in case of sickness or maternity, as such benefits imply that they are working and, as a consequence, independently covered under their own applicable legislation for all sickness and maternity benefits. Where family members are staying outside the competent state or have transferred their residence away from that state after having become entitled to benefits in kind while still there, the rules are the same as for their principal.[84]

Liability for payment of family benefits has already been discussed,[85] but, in the context of family rights, mention should be made of the person actually entitled to receive such benefits and of the position of orphans.

Where a family resides with its principal in the competent state, payment of family benefits is made to whomever is designated as the recipient by the competent legislation.[86] But, in the case of a family residing outside the competent state, Community law provides for payment to the person actually maintaining the family in their member state of residence, whatever the provisions of the national legislation in question, where the principal is misapplying the benefits[87] or where the member states concerned have so agreed between themselves.[88] Family allowances payable in respect of a principal who is subject to French legislation are always to be provided directly to the person actually maintaining the family.[89]

Orphans[90] of deceased principals are entitled to continued family benefits and may also qualify for supplementary allowances.[91] Where the principal was subject to only one legislation, the member state concerned is responsible for the payment of these benefits to the orphan.[92] However, if the principal was subject during his working life to the legislation of two or more member states, the orphan is entitled to benefits from his member state of residence according to its legislation, provided that the principal had acquired the right to family benefits in that state.[93] If no such right was acquired, the responsible state is the one to whose legislation the principal was subject for the longest period of time[94] or, where equal periods were spent in two or more states, the one to whose legislation the principal was last subject.[95] Once the orphan becomes eligible for family benefits under the legislation of any other member state by virtue of the pursuit of a professional or trade activity, the competent state may reduce the orphan's benefit by the actual amount of these benefits.[96]

THE BENEFICIARIES OF FAMILY RIGHTS

The Rights of Entry and Residence

The essential rights that family members must be able to obtain are those of entry and residence, for without these the other personal mobility rights will remain theoretical abstractions incapable of exercise. Only certain family members have an absolute right to entry and residence. These are identified in Directive 73/148 with respect to self-employed principals as the spouse of the principal,[97] their minor children,[98] and dependent ascendants or descendants of either the principal or spouse.[99] It is possible that the minor children of the spouse are excluded unless the principal is the other natural parent or has adopted them[100] or unless they are dependent on the spouse.[101] It is also not clear whether dependent ascendants and descendants include persons living by their own means but under the family roof. In both instances it is suggested that the legislation should be interpreted liberally for the sake of consistency with the Treaty, for the inability to bring to the host state a spouse's minor child or a descendant or ascendant who normally lives with the family could constitute a powerful disincentive to free movement. Such an interpretation is not difficult to justify; Article 1(2) of the directive equates living under the family roof with dependancy, and the term "children" can surely be read to include persons to whom the principal stands in loco parentis.

Article 10(1) of Regulation 1612/68, which accords an absolute right of entry and residence to the spouse of an employed principal,[102] their minor or dependent descendants,[103] and dependent ascendants of either spouse or principal,[104] raises similar problems. But once again it is possible to resolve the question of the dependency of descendants and ascendants by virtue of Article 10(2) of the regulation equating living under the family room with dependancy. Likewise, a broad meaning can surely be given to the term, "their descendants" in Article 10(1)(a) by interpreting "their" as referring to both common and separate progeny. This leaves one outstanding difference between the directive and the regulation. Whereas the directive requires dependancy when an accompanying minor is not the child of the self-employed principal,[105] the regulation would permit an employed principal to be joined by any minor descendant whether he is dependent or not.[106] The position taken by the directive is more logical, for free movement does not require that a grandparent, for example, be able to take his grandchildren with him for no other reason than that they have not yet reached twenty-one years of age. It is a moot point whether the regulation can thus go beyond what is required by Article 48 to bring about the free movement of workers.

Family members other than the spouse of the principal and their descendants and ascendants do not possess an automatic right of entry and residence in the host state; member states are merely required to facilitate their admission under Regulation 1612/68 and to favour it under Directive 73/148 when they are dependent or living under the same roof.[107] This is very ambiguous language; it neither requires admission nor permits exclusion. What it does do is encourage prevarication by national authorities, and the ensuing uncertainty surrounding the fate of uncles, nephews and other collateral relatives who rely on the principal's family in the Member State of origin has been criticised as an obstacle to free movement.[108] But it must be asked whether it is not a reasonable limitation on family rights that they not be automatically extended to collateral relatives. Free movement indeed requires the abolition of discriminatory barriers, but does this include coping with the individual requirements of every person within the Community or even with the cultural idiosyncaracies of a specific region? An ambivalence in the face of such a question may well account for the ambiguity of the provisions on collateral relatives. In fact, exclusion of these relatives, at least with respect to employed principals, may well be effected by another provision, namely Article 10(3) of Regulation 1612/68 requiring the employee to have adequate housing available for his family in the host state.[109]

All family members who have acquired a derivative right of residence in the host state are eligible for permanent residence under Regulation 1251/70 and Directive 75/34.[110] They are also protected at all times by Directive 64/221 on the application of the public policy exception.[111]

The Right to a Livelihood and Equality

Once a family member has been permitted to install himself in the host state, he should be accorded complete equality of treatment including, in the case of non-E.E.C. nationals, a derivative right to pursue a livelihood. There is no basis upon which a distinction can legitimately be made between family members in this regard. Furthermore, the logic underlying the concept of personal mobility demands such equality; there is little point in giving the principal the right to be joined by his family if their residence in the host state entitles them only to an inferior status. The Court of Justice has recognised this fact in numerous cases,[112] as does the Council when it calls for the integration of the non-national family in the Preamble to Regulation 1612/68.[113] Nevertheless, the secondary legislation does seek to limit some rights to certain family members. Article 11 of Regulation 1612/68 grants a right of employment only to the non-E.E.C. spouse and children, and Article 12 of the same regulation restricts educational rights to a principal's children. It is suggested that neither of these provisions can stand in this form.

Social Security Rights

A particular problem arises with respect to Regulation 1408/71, for Article 1(f) of the regulation permits a Member State to determine which family members may benefit from its social security legislation. This national discretion was effectively taken away by the decisions of the Court of Justice in Fracas (7/75) and Inzirillo (63/76), which opened up all derivable benefits to non-national family members. The question that must now be answered is how the term "family members" in Article 2(1) of the regulation is to be interpreted if this is not to be left up to the member states. The solution proposed by Advocate-General Trabucchi in Fracas (7/75) was that the term should include any family member who has a right of entry and residence under Community law.[114] The Court of Justice was not prepared to endorse this suggestion and merely declared that a minor child dependent on its parents is certainly included.[115] At the same time, however, the Court went on to say that an adult child could derive a right to social security benefits under the regulation if he or she was not able to establish a personal right to them. Such a right, in the Court's view, flowed logically from the principal's right to equal treatment:

> Indeed, if this were not the case, a worker anxious to ensure to his child the lasting enjoyment of the benefits necessitated by his condition as a handicapped person, would be induced not to remain in the member-State where he has established himself and has found his employment, which would run counter to the object sought to be attained by the principle of free movement of workers[116] within the Community....[117]

In Inzirillo (63/76) the Court put this statement into practice by according a grant for handicapped persons to the adult child of a non-national employee. It is difficult, therefore, to understand the Court's coyness in the face of the Advocate-General's suggestion in Fracas (7/75), for the quotation above and the decision in Inzirillo (63/76) indicate that it is prepared to accept an even wider definition of "family members" than the one put forward by Trabucchi. For, if the criterion for establishing family derivability with respect to social security benefits is to be determined by the ambit of the principal's right to equality, any family member residing in the host state for whom he is responsible must be included. And this, it is suggested, is an excellent definition, as, unlike that of the Advocate-General, it also takes into account those family members for whom Community law only requires a facilitation of entry.[118] It is also more in keeping with the inner logic of personal mobility, which, as was suggested earlier,[119] requires that all family members residing in the host state be treated in the same way as their national counterparts.

FOOTNOTES

Chapter 4D

[1] The English Court of Queen's Bench also based this decision on the ground that domestic nationals have no right to the protection of Community law. This is not so - see the discussion of the position of domestic nationals under the Treaty in Chapter 1, pp. 32-34.

[2] For the sake of brevity this term is used to denote the employed or self-employed person from whom the family's rights derive.

[3] Emphasis added.

[4] Preamble to Directive 75/35, 8th recital. The 7th recital to the Preamble of Regulation 1251/70 is worded a little differently, but the meaning is the same.

[5] Comm. Reg. 1251/70, art. 3(1); Co. Dir. 75/34, art. 3(1).

[6] Co. Reg. 1408/71, art. 1(f). But see, infra, pp. 424-425.

[7] Fracas, 7/75, [1975] 2 C.M.L.R. 442 at 455; Inzirillo, 63/76, [1978] 3 C.M.L.R. 596 at 604. These cases are also discussed, infra, at pp. 424-425 and 430-432.

[8] See the discussion in Chapter 4C, pp. 363-365.

[9] [1975] 2 C.M.L.R. 442 at 455. See, too, Inzirillo, 63/76, [1978] 3 C.M.L.R. 596 at 605.

[10] This case is also discussed, infra, at pp. 421-422.

[11] [1976] 1 C.M.L.R. 573 at 583 - see the discussion, infra, pp. 421-422.

[12] Article 11.

[13] Article 12.

[14] Article 3(2) in both cases.

[15] See Articles 19(2), 22(3), 44(1), 78.

[16] [1976] 1 C.M.L.R. 573 at 583.

[17] Ibid. See the quotation from this case, supra, p. 412.

[18] See, too, P.S.R.F. Mathijsen, A Guide to European Community Law (London: Sweet and Maxwell, 1980), at p. 132.

[19] [1975] 2 C.M.L.R. 442 at 454.

[20] See Chapter 1, pp. 29-37.

[21] The Court, too, seems to have taken this view in subsequent cases. There is, for example, no mention of Article 7 in Fiorini (32/75) despite the Commission's suggestion that the benefit could have been awarded on the basis of this article.

[22] 5th recital.

[23] It is probable, however, that this general prohibition only applied to the principal's self-employment - see Chapter 4 , pp. 308-309.

[24] Co. Dir. 68/360, arts. 1, 3(1), 4(1) with regard to employees' families; Co. Dir. 73/148, arts. 1(1)(c) & (d), 3(1), 4(1), (2), (3) for the families of the self-employed. It will be noted that Article 4(1) and (2) of Directive 73/148 does not explicitly include family members in the right of residence, but the reference in Article 4(3) to the right of non-EEC family members to a residence permit clearly indicates that this is an oversight. In case of doubt, Article 1 expressly confers on them a right to residence.

[25] Co. Dir. 64/221, art. 1(2). This article was applied in Royer (48/75) to protect the husband of a non-national from expulsion from Belgium.

[26] Co. Dirs. 72/194, art. 1; 75/35, art. 1.

[27] Co. Reg. 1251/70, art. 3(1); Co. Dir. 75/34, art. 3(1).

[28] Co. Reg. 1251/70, art. 3(2); Co. Dir. 75/34, art. 3(2).

[29] Co. Reg. 1251/70, art. 3(2), first indent; Co. Dir. 75/34, art. 3(2), first indent.

[30] Ibid., second indent in both cases.

[31] Ibid., third indent in both cases.

[32] Co. Dirs. 68/360, art. 4(3)(c); 73/148, art. 6(a).

[33] Co. Dirs. 68/360, art. 4(3)(d); 73/148, art. 6(b).

[34] See the discussion, infra, at pp. 427-429 on the family members who enjoy the right to entry and residence.

[35] Co. Dirs. 68/360, art. 4(3)(e); 73/148, art. 6(b).

[36] Co. Dir. 68/360, art. 4(3)(d), (e).

[37] Co. Dir. 73/148, art. 6.

[38] Co. Reg. 1251/70, art. 5(2); Co. Dir. 75/34, art. 5(2).

[39] Co. Reg. 1612/68, art. 10; Co. Dir. 68/360, art. 1; Co. Dir. 73/148, art. 1(1)(c), (d). See *Kermaschek* (40/76), where the Yugoslav wife of a migrant worker was permitted to follow her husband back to Germany.

[40] Co. Dirs. 68/360, art. 3(2); 73/148, art. 3(2).

[41] Ibid.

[42] Co. Dirs. 68/360, art. 9(2); 73/148, art. 7(2).

[43] Co. Dirs. 68/360, art. 4(4); 73/148, art. 4(3).

[44] Co. Reg. 1612/68, art. 10(3).

[45] Ibid.

[46] Derrick Wyatt and Alan Dashwood, *The Substantive Law of the EEC* (London: Sweet and Maxwell, 1980) at p. 131 regard the inability to provide accomodation for a dependent relative as a "potent disincentive to migration."

[47] Article 11 is not directed specifically at non-E.E.C. nationals but applies "even if they [the spouse and children] are not nationals of any Member State."

[48] Article 7 of Directive 75/34 only guarantees the continuation of rights that the family enjoy under the directives on self-employed activities, which contains no equivalent to Article 11 of Regulation 1612/68. However, as these directives have been superseded by the Treaty provisions, Article 7 could be interpreted as guaranteeing the continuation of the right to complete equality that the Treaty has been construed by the Court of Justice as bestowing.

[49] *See*, *supra*, pp. 411-412.

[50] *See*, too, *Alaimo* (68/74).

[51] [1973] E.C.R. 457 at 464.

[52] This difference was mentioned by Advocate-General Trabucchi in his submission to the Court in *Fracas*, 7/75, [1975] 2 C.M.L.R. 442 at 446. He pointed out that the function of maintenance is not the same as that of education and may be taken thereby to have disapproved of the *Michel S* decision (76/72). The Court has never expressly rejected its reasoning in *Michel S* (76/72), but both *Fiorini* (32/75) and *Inzirillo* implicitly overrule the case - *see*, *infra*, p. 422.

[53] Article 12 refers to a principal "who is or has been employed," and in *Casagrande* (9/74) the Court of Justice applied it in the case of the son of a deceased non-national.

[54] Article 2.

[55] Ibid.

[56] Article 3.

[57] Article 1.

[58] *See* the discussion in Chapter 4A, p. 320.

[59] The Court granted relief on the basis of Article 12 instead - *see*, *supra*, p. 419.

[60] [1973] E.C.R. 457 at 463.

[61] *See* the discussion of this aspect of the Court's decision in Chapter 4B, pp. 347-348.

[62] [1976] 1 C.M.L.R. 573 at 583.

[63] Ibid.

[64] That the Court of Justice was breaking new ground in *Fiorini* (32/75) is also evident from the fact that Wyatt and Dashwood, *op, cit.*, at p. 145 still refer to Article 7 of Regulation 1251/70 as conferring on family members a right only to those benefits in Regulation 1612/68 that specifically relate to them.

[65] [1976] 1 C.M.L.R. 573 at 580.

[66] [1978] 3 C.M.L.R. 596 at 605.

[67] But *see* *Kermaschek* (110/76), *infra*.

[68] [1966] C.M.L.R. 508 at 522.

[69] *Fracas*, 7/75, [1975] 2 C.M.L.R. 442 at 455.

[70] Pursuant to Article 67 of Regulation 1408/71.

[71] [1976] E.C.R. 1669 at 1678.

[72] But *see* the decision in *Mazzier* (39/74) and *Fracas* (7/75), *infra*, p. 424 where an invalidity benefit was a *derivable right* as it was awarded without reference to employment.

[73] She would also have had a right to the benefits if they had been available without reference to employment. The use of aggregation under Article 67 of Regulation 1408/71 was only unavailable in order to obtain benefits to which she derived no right.

[74] *See* the discussion in Chapter 4C, pp. 363-365.

[75] *Fracas*, 7/75, [1975] 2 C.M.L.R. 442 at 454.

[76] *Fracas*, 7/75, [1975] 2 C.M.L.R. 442 at 455.

[77] [1978] 3 C.M.L.R. 596 at 603.

[78] Article 44(1) for pensions and 65(1) for death grants. See, Chapter 4C, pp. 385-390 for a discussion of these rules.

[79] Article 19(2), 1st paragraph.

[80] Article 19(2), 2nd paragraph.

[81] Article 19(2), 1st paragraph.

[82] See Chapter 4C, p. 383.

[83] Article 20.

[84] Article 22(3). See, Chapter 4C, pp. 375-376 and 382-383 for a discussion of these rules.

[85] See, Chapter 4C, pp. 377-378 and 383-384.

[86] Article 75(1)(a).

[87] Article 75(1)(b).

[88] Article 75(1)(c).

[89] Article 75(2)(b).

[90] Orphans do not, strictly speaking include dependent grandchildren. However, it is conceivable that the Court would give the term a broader meaning where necessary.

[91] Article 78(1).

[92] Article 78(2)(a).

[93] Article 78(2)(b)(i).

[94] Article 78(2)(b)(ii).

[95] Article 79(2).

[96] Article 79(3), as interpreted by the Court of Justice in Rossi (100/78) - see Chapter 4C, pp. 394-395. Despite the mention only of benefits arising from professional or trade activity, the Court has indicated in Rossi (100/78) that the provision also affects benefits arising from paid employment.

The Court interpreted Article 79(3) very strictly in Laumann (115/77), where it refused to apply it in the case of family benefits payable under Belgian legislation to the stepfather of two orphans who were in receipt of a German orphans' pension. In the Court's view, the family benefits in question did not overlap with the orphans' pensions as they were payable to the stepfather and not to the children - [1978] 3 C.M.L.R. 201 at 211.

[97] Article 1(1)(c).

[98] Ibid. Community law places the age of majority at twenty-one years.

[99] Article 1(1)(d).

[100] Article 1(1)(c) refers to "the children...of such nationals [the principals]".

[101] In which case they would appear to qualify as "dependent descendants" under Article 1(1)(d).

[102] Article 10(1)(a).

[103] Ibid. *See* the comment to fn. 98.

[104] Article 10(1)(b).

[105] Article 1(1)(c) of Directive 73/148 refers exclusively to minor *children*.

[106] Article 10(1)(a) of Regulation 1612/68 refers to minor *descendants* with no restriction as to the closeness of the family relationship.

[107] Articles 10(2) and 1(2) respectively. Nothing turns on the different verbs used, nor, it is suggested, on the fact that Article 10(2) of Regulation 1612/68 mentions only dependancy on the principal and living under his roof; any relative being kept by the principal's family can be considered his dependant as well, and the principal's roof will normally be the equivalent of the family roof.

[108] *See* Wyatt and Dashwood, op. cit., at p. 131:

"One cannot imagine a more potent disincentive to migration than the inability to provide a house for a dependent relative for whom one has assumed responsibility."

[109] *See* the discussion, *supra*, at pp. 415-416.

[110] Article 1 in both cases.

[111] Co. Dirs. 64/221, art. 1(2); 72/194, art. 1; 75/35, art. 1 - *see* fn. 26.

[112] *See* in particular *Fiorini*, 32/75, [1976] 1 C.M.L.R. 573 at 583. *See*, too, the discussion, *supra* at pp. 421-422.

[113] 5th recital.

[114] [1975] 2 C.M.L.R. 442 at 451.

[115] [1975] 2 C.M.L.R. 442 at 455.

[116] Most of the cases dealing with social security rights involve the families of employed principals as it was not until 1981 that Regulation 1408/71 was extended to self-employed persons.

[117] [1975] 2 C.M.L.R. 442 at 455. This issue only arose in Fracas (7/75) as a theoretical possibility as the child in question was under twenty-one.

[118] See, supra, p. 409.

[119] See the discussion, supra, p. 413.

Chapter 4E

THE SCOPE OF THE RIGHT TO EQUAL TREATMENT

The Need for a Right of Residence

The right to equal treatment, like all other personal mobility rights, flows ultimately from Articles 48 to 66 of the Treaty and so shares the necessity for a work connection.[1] The question is whether it is available to persons who have acquired only a right of entry on the basis of a desire to work, or whether it is to be restricted to those who have secured a right of residence by virtue of having obtained employment or become self-employed. There is some merit in the view that a person cannot claim the same treatment as nationals until he has committed himself to living in their country and to sharing their responsibilities towards the host society.[2] On the other hand, certain elements of the right to equal treatment need to be available to an aspiring non-national resident, if he is not to be dissuaded from attempting to seek employment or self-employment in another member state. The most obvious of these is equality of opportunity in obtaining employment or setting up a business, but there may also be reason for permitting the non-national to enjoy other benefits, if their denial would make it impracticable for him to venture abroad. The underlying logic of personal mobility would thus seem to indicate a compromise between a strict prerequisite of residence and the general availability of equal treatment to all who have obtained a right of entry into the host state.

Under such a compromise, persons who have met the necessary prerequisites for the acquisition of the right of residence in the host state[3] would enjoy to the full all the facets of the right to equal treatment, as set out in the preceeding pages; while those who have as yet only met the prerequisites for acquiring a right of entry[4] would enjoy only those facets that are necessary to remove obstacles to their displacement. This is, in fact, more or less the scheme adopted by the secondary legislation with respect to employed persons. It guarantees to the entrant equality of opportunity in obtaining employment,[5] social and tax advantages for himself and his family for the length of their stay,[6] and a right of entry for his family.[7] Excluded are the right to equal conditions of employment, which, by its very nature, depends on the entrant obtaining work and thereby acquiring a right of residence, the right to unlimited social and tax advantages,[8] the right of non-E.E.C. family members to pursue a livelihood,[9] housing,[10] and educational[11] rights, and the family right of residence.[12] With the possible exception of educational rights, all five last-named rights are properly withheld, as they are all premised on the non-national transferring his residence to the host state. What would be the justification for permitting a non-national access to scarce housing facilities if he is not yet sure of remaining to use them, or for according his family the rights to work and residence when he, through whom such rights are derived, does not exercise them himself? The exclusion of educational rights is more problematical. If children are to be permitted to accompany their parents to another member state, it would appear incumbent upon that state to see to their educational needs. However, the obligation lasts only as long as the family remains in the state, and so perhaps no special arrangements need be made for the children at Community law. This may explain the inapplicability of Article 12 of Regulation 1612/68 and of Directive 77/486 in such circumstances.[13]

The secondary legislation relating to self-employed activities also excludes the right of non-E.E.C. family members to work[14] and the family residence right,[15] where the principal has not yet established himself in the host state. But the incorporation of Title I of the general programmes into most of the directives on these activities makes their provisions available to both entrants and residents;[16] and the further incorporation of Title III with its general guarantee of equal treatment for the principal in all matters obscures any consistent distinction based on the rights of entry and residence.[17] Nevertheless, the general principle behind the allocation of equality rights for the employed must also apply to the self-employed. And, if equal conditions of self-employment are to affect only those persons who have established themselves, as they must do despite the incorporation of Title I, this can be taken as a precedent for extending the limitation in order to bring the position of the self-employed into line with that of the employed.

It should also be noted that Article 8 of Directive 80/1263 on the exchangeability of driving licences issued by member states applies only where a person transfers his residence from one member state to another. This is a sensible provision. In the first place, it is likely that a person's national driving licence will retain its validity during a temporary stay in another state. Secondly, the limitation operates to prevent people going to take a driving test in another state purely because it is less rigorous than the domestic test. This provision applies to both employed and self-employed persons and to their families.

Entitlement to social security benefits in the host state, which is another aspect of equal treatment, involves two separate considerations. One of these is the special arrangements that are made by Regulation 1408/71 to ensure that a person continues to receive benefits from the competent state notwithstanding his absence from that state.[18] In the case of benefits in kind for sickness and maternity, accidents at work, and occupational diseases, these are to be provided by the member state in which the recipient finds himself at the time the risk materialises.[19] This rule applies even where the recipient has no right of entry or residence in that state, for it is sufficient under the regulation that he be covered by the national social security legislation of his home state.[20] Thus, in Maison Singer (44/65), which was a case dealing with the different topic of subrogation rights, a tourist was held by the Court of Justice to come within the special arrangements of Regulation 3, the predecessor to Regulation 1408/71. It dismissed the objection that the regulation, by permitting tourists to benefit from its provisions, went beyond the mandate of Article 51, which provides only for special social security arrangements for migrant workers and their families.[21]

The Maison Singer decision (44/65), confirming as it does the right to enjoy the benefit of Regulation 1408/71 regardless of any work connection, should not be thought to confer on a person any right to equal treatment in a state where he possesses no right of entry or residence. The member state that pays out benefits in kind in cases of sickness and the like is assuming no responsibility for the social security coverage of the recipients; rather, it is acting as an agent of the recipient's competent state and can claim reimbursement from it for the expenditure thereby incurred.[22]

Actual responsibility for providing a person with social security benefits is a separate consideration. It arises only when a member state's legislation becomes applicable to the person concerned, and the general rule is that the applicable legislation in matters of social security is that of the member state where a person is employed or self-employed.[23]

There are exceptions to this rule, but all require a work connection before a member state can become liable.[24] It might appear, therefore, that the right to social security will go hand in hand with the right to residence in a particular state, but this is not necessarily the case. This anomaly is due to the fact that, although the employees of domestic employers and self-employed persons who work temporarily in another Member State for purposes other than the provision of services may not qualify for a right of entry or residence,[25] they can come under the social security legislation of the other Member State if their activity there lasts for more than a year.[26] In all other circumstances, however, the right to social security coverage does presuppose a right of residence.

The Company or Firm as Beneficiary

Companies and firms derive their right to equal treatment from Article 58 of the Treaty, which provides that they are protected by the Treaty in the same way as natural persons. They are also included as beneficiaries of the general programmes[27] and enjoy the rights set out therein and the effect of their incorporation into the directives on self-employed activities.[28] Like natural persons, they cannot be required to fulfill special conditions in order to obtain necessary authorisations,[29] made subject to more onerous financial burdens,[30] hindered in their access to sources of supply,[31] given less favourable treatment in the event of nationalisation,[32] and so on. As with natural persons, formalities will not be held to impede free movement if they are not onerous to complete, do not cause unreasonable delay, and their fulfilment is not subject to a Member State's discretion.[33] For example, a non-national company would have to comply with foreign registration requirements.

Obviously the right of companies and firms to equal treatment will be more limited than that of a natural person due to the fact that they are legal abstractions. Neither companies nor firms will need social security benefits, for example, or family and housing rights. Essentially, their right to equal treatment will be confined to equal conditions of doing business.

The Question of Nationality

The necessity for E.E.C. nationality. As with all the other personal mobility rights, only persons with the nationality of a member state benefit under Community law from the right to equal treatment.[34] This leaves the problem of those key non-E.E.C. personnel that are permitted to be sent to work and reside in another member state and whose rights derive from their E.E.C. employer's right to pursue his livelihood under equal conditions with nationals.[35]

It was suggested in Chapter 2B that the rights of these persons should be kept to the minimum necessary for them to accept secondment to another member state, and that this did not include granting them the right to remain in the host state after ending their working life.[36] The same approach is recommended in the matter of equal treatment. Of course, it is difficult to establish which of the benefits that make up equal treatment should be excluded, as what would represent an insuperable obstacle for one worker will be easily tolerated by another. A somewhat arbitrary minimum would be the right to equality in employment, entitlement to all social and fiscal advantages that accrue from the contract of employment, and the right to be accompanied by a spouse and children together with educational rights for the latter. Unfortunately the special social security arrangements, to which they should also be entitled, are only available to them under Regulation 1408/71 if they are stateless persons or refugess in the member state of origin.[37] Nor can they obtain them by recourse to the Treaty, as these arrangements do not flow directly from the Treaty.[38] They should, however, be entitled to actual social security coverage while in the host state, and, if they are excluded by national legislation, this right could be obtained by way of the Treaty.

The position of domestic nationals. As in all other areas of personal mobility, domestic nationals only enjoy a right to equal treatment in their own country under Community law when they have severed their connection with that country. A British national, for example, who goes to reside and work in France and then returns to the United Kingdom, would have the right to be accompanied by his wife regardless of her nationality. In such a situation he would have become assimilated to the position of a French national coming to work in the United Kingdom with a right to equal treatment that includes derivative family rights. By contrast the British national in Ayub (U.K.) had gone to Belgium to seek work but had returned home without having found employment and obtained a right of residence in Belgium. As a result she had not severed her connection with the United Kingdom and could not bestow upon her Pakistani husband a right of entry into her own country. The Egyptian husband of a German woman who had never resided or worked outside her native Germany was denied a residence permit by a German court for the same reasons.[39] It is significant that both these cases deal with derivative family rights, for it is this aspect of the right to equality that is most likely to affect domestic nationals who are not protected by Community law. They will rarely be the target of discriminatory conditions of work or social legislation, as the discrimination is invariably directed against non-nationals.

Exceptions to the Right to Equal Treatment

As a general principle, the exceptions of official authority and public service employment apply only to the right to pursue a livelihood, as they have been limited by the Court of Justice to access to positions falling within their scope. For this reason they have been discussed in detail in the preceeding chapter.[40] The exceptions do, however, effect the right to equal treatment in cases of promotion, which could be considered part of the conditions of employment, and of appointments to posts within professional and public bodies, which could come within the right of the non-national to play an equal role in the host society.

The Court has not yet made a definite pronouncement on promotions, but logic would dictate that, where a position is unavailable to non-nationals by virtue of its sensitive nature, it matters little how it is acquired.[41] By contrast, the Council has taken a very clear position with respect to certain potential public service activities of non-nationals. Article 8(1) of Regulation 1612/68 permits member states to exclude them from the management of public bodies and public offices while exercising their trade union rights. Article 3(1) of Regulation 1408/71 grants similar discretion to national authorities in the case of membership of the governing bodies of social security institutions. And the directives on self-employed activities routinely provide that high office in professional or trade organisations "may be reserved for nationals where, in pursuance of any provision laid down by by-law or regulation, the organisation concerned is connected with the exercise of official authority."[42]

The provisions regarding trade union-related activity and the total discretion of member states in determining eligibility for membership in social security bodies probably accord with the scope of the exceptions.[43] However, the reservation of high office in professional and trade organisations for nationals goes beyond what the Court of Justice has interpreted Article 55 to permit.[44] There is no attempt to relate the reservation to posts that themselves necessarily involve the exercise of official authority; it is sufficient, according to the directives, that the organisation as a whole be so involved. Thus, unless the reservation can be regarded as an exercise by the Council of its deeming power under the second paragraph of Article 35,[45] it is inconsistent with the Treaty as interpreted by the Court.

The exceptions of public policy, security, and health do not apply at all to the right to equal treatment.[46] They are limited by Directive 64/221 to entry and residence[47] and, as was pointed out in Chapter 2D,[48] this limitation accords with the Court's attitude that there can be no justification for taking away a person's right to equal treatment in the absence of sufficient grounds for prohibiting his presence altogether in the host state.

FOOTNOTES

Chapter 4E

[1] See Chapter 1, pp. 8-9, Chapter 2A, pp. 71-73, Chapter 2B, p. 107.

[2] This view is expressed by T.C. Hartley, "The Internal Personal Scope of the EEC Immigration Provisions," (1978), 3 European Law Review 191 at 192.

[3] See Chapter 2B, pp. 107-109.

[4] See Chapter 2A, pp. 71-81.

[5] Co. Reg. 1612/68, arts. 1-6.

[6] See Fiorini, 32/75, [1976] 1 C.M.L.R. 516 at 573, where the Court of Justice held that Article 7(2) of Regulation 1612/68 makes social benefits available to the principal and his family regardless of any lack of connection with his contract of employment provided they are present in the host state.

[7] Co. Dir. 68/360, arts. 1-6.

[8] This is the implication of Fiorini (32/75) - see fn. 6.

[9] Co. Reg. 1612/68, art. 11.

[10] Co. Reg. 1612/68, art. 9(1).

[11] Co. Reg. 1612/68, art. 12; Co. Dir. 77/486, art. 1.

[12] Co. Dir. 68/360, art. 4(3). The language of the provision is not very clear in this regard, but it may be assumed that paragraphs (c) and (d) of Article 4(3) do not become operative until paragraphs (a) and (b) have been complied with.

[13] See the discussion of family educational rights in Chapter 4D, pp. 418-420.

[14] Co. Reg. 1612/68, art. 11.

[15] Co. Dir. 73/148, art. 6. Once again the language is obscure, but it would appear that the family right to residence under Article 6 is premised on compliance with Article 4(1) of the directive.

[16] Title I of the General Programme on services requires only establishment in another Member State; Title I of the General Programme on establishment expressly includes those who wish to establish themselves.

[17] But this guarantee may only relate to business activity - see Chapter 4 A, pp. 308-309.

[18] See the discussion on payment outside the competent state, in Chapter 4C, pp. 374-378.

[19] See Articles 19(1)(a), 22(1)(i), 52(a), 55(1)(i) of Regulation 1408/71.

[20] Article 2(1). Not all national social security schemes, however, are covered by the regulation - see Chapter 4C, pp. 361-362.

[21] This case is discussed in Chapter 1, p. 9 and Chapter 4A, pp. 312-313.

[22] Co. Reg. 1408/71, arts. 36, 63. This reimbursement can be waived, but that is purely an administrative decision and not an assumption of responsibility towards the person concerned.

[23] Co. Reg. 1408/71, art. 13(2)(a).

[24] See Article 14 and the discussion in Chapter 4C, pp. 378-380.

[25] See Chapter 2A, pp. 73-76 and Chapter 2B, p. 108.

[26] Articles 14(1)(b) and 14a(1)(b) of Regulation 1408/71.

[27] Title 1.

[28] Most of the directives also incorporate Title 1 and so apply to companies and firms - see Chapter 3D, pp.

[29] Title IIIA of the general programmes, paragraph 2(c).

[30] Title IIIA, paragraph 2(e).

[31] Title IIIA, paragraph 2(f).

[32] Title IIIA, paragraph 2(j) - 2(h) of the General Programme on services.

[33] See Chapter 4B, pp. 332-333.

[34] See Chapter 2 , pp. 81-82, Chapter 2B, p . 109 and Chapter 3D, pp. 284-285.

[35] See Chapter 3B, pp. 232-233.

[36] See pp. 109-110.

[37] Article 2(1) of Regulation 1408/71.

[38] See Chapter 1, pp. 23-24.

[39] Egyptian Husband (Germany).

[40] See Chapter 3E.

[41] See Chapter 3E, p. 299.

[42] See Co. Dir. 71/18, art. 5(2). The summary of directives in the Appendix lists equivalent provisions in other directives.

[43] See Chapter 3E, pp. 292-294.

[44] See Chapter 3E, pp. 292-294.

[45] See Chapter 3E, pp. 295-296.

[46] It can, however, indirectly affect the right to equality - see the discussion of the van Duyn case (41/74) in Chapter 2D, pp. 152-153.

[47] Article 2(1).

[48] See, pp. 140-141.

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Chapter 5

THE CONCLUSION

The Scheme of Personal Mobility in the E.E.C.

The right of entry. A natural person may enter another member state of the European Economic Community as of right in order to take up paid employment, to establish a business or to provide services or when he evinces a desire to do these things. He may have to fulfil certain Community or national formalities, in default of which he may be subject to the imposition of sanctions. However, these sanctions cannot affect his right to enter the state concerned and must be proportionate to the gravity of the non-compliance; denial of entry or incarceration are not permitted.

The right of entry is not absolute. It can be denied by the prospective host state on grounds of public policy or public health[1] or where the non-national does not have the proper work connection. The intention or desire to set up a temporary establishment in another member state does not entitle a person to entry. The necessary work connection is also possibly lacking when services are to be provided in the host state to a recipient who resides in the same state where the provider is established, or when an employee works for a domestic employer in another member state in a capacity that does not involve the provision of services on his employer's behalf.[2] The Community formalities referred to above concern the use of the public policy and public health exception and the enforcement of the work connection.

The right of entry into other member states implies a right of exit from the member state of origin that is co-extensive in scope with the first right. Such a right to emigrate is guaranteed by the secondary legislation.

The right of residence. A natural person who has employment or has established a business or is providing services in another member state has a right to reside in that state. Persons who have entered another member state with the wish to do these things must be allowed to reside there on sufferance for a minimum period of three months. They acquire a right of residence only if their wish becomes reality. Both residents as of right and residents on sufferance may be required to comply with Community and national formalities, but the permissible sanctions differ in the two cases. As with the right of entry, the right of residence cannot be affected by these sanctions, which must also be proportionate to the gravity of the offence. Similar protection is not afforded to residents on sufferance, whose stay in the host state is regulated exclusively by national law including all the sanctions for non-compliance with national formalities that this entails. The only limitations placed upon this national autonomy are that it not operate so as to render worthless the right of entry nor be used to circumvent the restrictions surrounding the use of the public policy and public health exception with respect to entry.[3]

There are two categories of the right of residence. Persons who are providing services in the host state on their own behalf or for a domestic employer and persons who are employed by an employer established in the host state[4] under a contract lasting less than a year are entitled to a limited right of residence. This right is evidenced by a right of abode for self-employed providers and by a temporary residence permit for all employees where the stay exceeds three months, and by the travel document with which the non-national entered the host state where the stay is for three months or less. The limited right of residence ends immediately the services have been performed or the employment ceases regardless of the status of the document attesting it.[5] Employees who have a contract of employment with an employer in the host state[6] that lasts for a year or more and self-employed persons who establish themselves have an unlimited right of residence,[7] which must be evidenced by a residence permit valid for five years initially and automatically renewable. This right is unlimited as it continues even after the cessation of employment or self-employed activity in the host state provided that this occurs because of retirement or incapacity and in accordance with the criteria set out in the secondary legislation.[8]

Neither the limited nor the unlimited right of residence are absolute. They can both be denied for the same reasons as a prospective host state can advance for refusing entry, namely, on grounds of public policy and public health[9] and where the non-national does not have the proper work connection.[10] They can also be withdrawn for these reasons except that in the case of the public health exception, the disability or illness concerned must have arisen prior to the non-national's acquisition of the right. In addition the right may be withdrawn where the non-national is absent from the host state for more than six months consecutively - unless the absence is occasioned by the obligation to perform military service - and where the non-national voluntarily ceases to be employed or gives up his business. Involuntary unemployment and permanent incapacity for work put an immediate end to the limited right of residence but, depending on when they occur, may not justify the host state in withdrawing the unlimited right of residence.[11] The secondary legislation seems to indicate that self-employed persons may always be expelled for involuntary unemployment, but this may be inconsistent with the Treaty.[12]

The Community formalities that attend the right of residence and with which the non-national must comply concern the use of the public policy and public health exception, the enforcement of the proper work connection and the issuance of documents to attest the right of residence.

The recognition of companies and firms. The equivalent to the rights of entry and residence for companies and firms is the right to recognition of their corporate status in the host state. However, unlike the rights of entry and residence, the right to corporate recognition probably does not flow from the Treaty, which is particularly unfortunate as the Convention establishing a Community right to such recognition has not yet been ratified. As a result companies and firms must rely on the provisions of national law for recognition of their status in other member states. This causes no problems in the case of secondary establishments and the provision of services, but where a company wishes to transfer a primary establishment that houses its central administration, it may indeed encounter difficulties in Member States that apply the real seat theory of corporate law. This theory holds that a company is created and governed by the law of the state of its central administration, and it can operate so as to eliminate the corporate status of an emigrating company and to require reincorporation from an immigrating company.

The right to pursue a livelihood. The rights of entry and residence are relatively straightforward, as they require nothing more than the elimination of national measures that discriminate against non-nationals. It is rare that nationals are denied the right to enter or reside in their own country, and so it suffices to place non-nationals on an equal footing with them. But when it comes to the right to pursue a livelihood in another member state, a more radical transformation of national laws and practices is necessary to make the right effective. What is required is not only the elimination of measures that discriminate against non-nationals but also the prohibition of laws that apply irrespective of nationality but which place non-nationals at a peculiar disadvantage because of the criteria upon which they are based. The Treaty, however, as interpreted by the Court of Justice, only forbids such general laws as discrimination in fact when they lack an objective justification or constitute a disproportionate interference with personal mobility in relation to the public good that they serve. This means that some barriers to the right to pursue a livelihood will remain among the member states, and so the Treaty provides further for the harmonisation of national laws that will still obstruct the exercise of the right even after its implementation. The harmonising legislation issued by the Council pursuant to the Treaty has only partially removed these barriers.

The various national measures that can discriminate in law or in fact against non-nationals by preventing their exercise of the right to pursue a livelihood have been categorized in this study as a direct prohibition of the right, measures having an equivalent effect, and the subjection of the right to the fulfilment of prerequisites or to exceptionally onerous conditions of exercise. Discrimination in fact occurs most frequently in the case of prerequisites. Substantive prerequisites, such as the need for the host state's qualifications, competence in its language or prior residence within its territory, will almost always place any non-national at a disadvantage in relation to nationals, while the delay involved in fulfilling formal prerequisites can totally vitiate the right of non-nationals to provide services in the member state applying them. There will not, however, be discrimination where these prerequisites can be objectively justified and are proportionate. Despite their more far-reaching effect, substantive prerequisites, with the exception of the need for prior residence, often demonstratively serve the public good, and, because of the importance of this public interest, will rarely be held to interfere unduly with personal mobility.[13] Formal prerequisites that affect the right to provide services, on the other hand, are more difficult to justify, and, even where this is possible, they may be considered unnecessary where the provider has complied with similar formalities in his state of establishment. The application of prerequisites or any other restrictive measures on the basis of residence will also normally constitute discrimination in fact, although it can be justified in the case of non-resident providers by the need to enforce professional rules of conduct where such rules exist, there are no other less stringent ways of enforcing them, and the non-resident is not already adequately controlled by the authorities of his state of establishment.

The prohibition by the Treaty and its subsidiary secondary legislation of discrimination in law and in fact affecting the non-national's right to pursue his livelihood is complemented by other secondary legislation aimed at removing some of the restrictions on the right that still remain in national laws that escape the prohibition. On some occasions this takes the form of overriding national provisions despite their validity. Thus, the health care directives exempt non-nationals from the need to acquire competence in the language of the host state and, together with some other directives, dispense providers from the formal requirement to obtain a permit or join a professional or trade organisation and from the substantive prerequisite of passing professional examinations.[14] More frequently the legislation provides a harmonising mechanism to enable non-nationals to comply with valid national laws. This harmonising legislation consists of directives on the mutual recognition of qualifications, transitional arrangements that entitle non-nationals to have their business activities considered as the equivalent to the trade qualifications required by the host state, facilitative procedures for proving good repute and other personal attributes, and coordination of national laws on the taking up and pursuit of self-employed activities. This complementary legislation does not, however, remove all the restrictions that are not prohibited by the Treaty, so that the comprehensive right to pursue a livelihood bestowed by the Treaty is in fact limited to those activities that are capable of being exercised by non-nationals. Employees are in a worse position than self-employed persons, as only some of the complementary legislation applies to them.

There is some controversy as to whether the prohibition on discrimination applies as well to private individuals. The generally-held view is that private discrimination is only prohibited in the case of collective regulation. This would include the rules of professional bodies and collective agreements between employers and their workers. This view was disputed earlier in this study, and it was suggested that the individual acts of private employers are also subject to the prohibition.[15]

The right to pursue a livelihood is not directly affected by the exception based on public policy or public health or by the need to establish the proper work connection, but it will be indirectly affected if the non-national is denied entry or residence on these grounds. The right is, however, subject to the exceptions based on employment in the public service and on self-employed activities that involve a connection with the exercise of official authority. The latter exception has been restrictively interpreted by the Court of Justice to include only activities that *necessarily* involve the *actual* exercise of official authority, whereas the former would seem to apply to all public service positions at the option of the host state.[16]

The right to equality. The right to equality is the most far-reaching of the personal mobility rights that a non-national enjoys at Community law, for it entitles him to nothing less than complete equality with nationals in all areas of life in the host state except for political and civic rights. The latter rights have a political dimension that goes beyond the economic parameters of the Treaty. Specific equality rights that are guaranteed by the secondary legislation are equal conditions of work, access to social and tax benefits and to housing facilities available to nationals, and the right to be accompanied by one's family and to have family members enjoy the same right to equality as the principal. Discrimination in fact relating to any aspect of the non-national's life in the host state is subject to the same prohibition as discrimination in law, and it is more difficult for a host state to justify general laws that affect this right to equality than it is with respect to the right to pursue a livelihood. Nevertheless some general laws that disadvantage non-nationals are not capable of correction on the basis of the Treaty right to equality because of the complex nature of the matters that they regulate, and it is left to the Council to eliminate the discrimination in fact that they entail by specific legislation. Two examples are double taxation and the recognition of a non-national's accrued benefits under another member state's social security scheme. The first matter is still awaiting Council action, but the second has been comprehensively regulated by Regulation 1408/71.

Despite the importance of the right to equality as the cement that holds up the whole edifice of personal mobility within the E.E.C.,[17] it is not spelled out in any great detail by the Treaty or the secondary legislation so that it has been up to the Court of Justice to establish its comprehensive scope. And even where the secondary legislation does set out specific rights, such as those referred to above, it is often unnecessarily restrictive. This is particularly so in the case of family rights. Not only does the legislation deny these rights to the minor but independent children of the principal's spouse, it also limits access to the host state's educational facilities to the principal's children and allows only a right to paid employment to the non-E.E.C. spouse and children.[18] These restrictions are incompatible with the principal's right to have his family enjoy complete equality in the host state. It is also absurd to permit a grandchild, for example, to accompany his grandparents to another Member State and then deny him access to its educational facilities or the right to work if he is not an E.E.C. national. The Court of Justice has not had an opportunity to pronounce on these restrictions, but it is to be hoped that it will reject them in the same way as it has rejected the limitation in Article 7(2) of Regulation 1612/68 confining non-nationals to only those social and tax benefits that arise from the principal's contract of employment.[19]

The scope of the right to equality enjoyed by a resident on sufferance in a host state is not clear.[20] He is certainly entitled to equality of opportunity in obtaining a job or setting up a business and can be accompanied by his family while staying in the host state. He is also probably entitled to available social benefits for the duration of his stay, and, although he has no right of access to the social security scheme of the host state, he can receive unemployment benefits due from his home state. This may be, however, the limit of what he can expect. He does not, for example, benefit from the Community rules on the transferability of driving licences and has no right of access to housing facilities in his temporary host state.

Neither the exception based on public policy and public health nor that for employment in the public service or for the exercise of official authority apply directly to the right of equality. They both affect it indirectly, however. If a person is denied entry or residence on grounds of public policy or public health, he will not be present to exercise his right of equality; if he is barred from a certain position or activity, he may still be able to reside within the host state on sufferance but with a reduced right to equality. The second exception also may impinge on the right to equality by permitting a member state to refuse promotion to sensitive positions within the public service to non-nationals and to curtail the private activities of non-nationals that involve the exercise of official authority.[21]

The beneficiaries of the Community mobility rights. Only nationals of a member state of the Community have autonomous rights of entry, residence, employment and equality. Non-E.E.C. family members derive their rights under Community mobility law from their E.E.C. principal as do non-E.E.C. employees from their E.E.C. employer. But whereas such family members enjoy the whole gamut of mobility rights, non-E.E.C. employees only derive those rights that are essential to permit their displacement to another Member State. It is unlikely that they are entitled to continued residence upon retirment or incapacity, and it is uncertain whether their right to equality extends much beyond working conditions and the right to be accompanied by their family. It is also possible that non-E.E.C. recipients of services who reside within the Community derive the necessary rights from their E.E.C. provider to permit them to travel to his state of establishment to receive the services.[22]

Domestic nationals occupy a singular position under the Treaty, which treats them in the same way as non-nationals except in the case of primary establishment. There seems to be no reason for this differentiation, and the Court of Justice has interpreted the Treaty as including domestic nationals as beneficiaries of its personal mobility provisions in all situations, provided that they have severed their connection with their home country by acquiring a right of residence in another member state. Where this is not the case, they are not covered by the Treaty at all.

Although companies and firms cannot derive a directly enforceable right to recognition within other member states from the Treaty, they are entitled under it to pursue a livelihood in conditions of equality. This will not help much, however, if they are not accorded the legal capacity to carry on business. There is some question whether the Treaty - or Convention once it is ratified - includes the Anglo-Irish partnership as a beneficiary of the Treaty provisions on personal mobility, but it must be assumed that it does.[23] Otherwise it will quite simply have to be amended.

Limitations and Lacunae in the E.E.C. Scheme

Introduction. Although the personal mobility provisions of Community law provide for all the rights that are necessary to bring about the free movement of persons between the member states of the Community, they are not without significant limitations and inadequacies. Some of these derive from the nature of personal mobility espoused by the Treaty; others stem from the composition of the Community, consisting as it does of an association of sovereign states; still others result from peculiarities in the wording of the Treaty and the secondary legislation.

The nature of personal mobility in the E.E.C. The Treaty aims at the achievement of economic personal mobility between the member states rather than political personal mobility. There is therefore no absolute right of entry and residence at Community law, which requires instead that a non-national have the appropriate work connection to the member state he wishes to enter and reside in.[24] There is some controversy surrounding the position of tourists, who could be said to have a work connection to the state whose tourist industry services their needs. On the other hand the right of recipients to enter and reside in other member states is a gloss on the right accorded by the Treaty to providers to travel in order to perform their services. The better view would thus appear to be that the right of recipients exists only as an alternative to the movement of the provider, and no such alternative is relevant where the provider is indissolubly tied to his state of establishment as in the case of the tourist industry.

Limitations arising from the exercise of national sovereignty. All the various derogations from the Treaty based on public policy, public health, public service, the exercise of official authority and national security emanate from the political sovereignty of the Member States. All are concerned with the protection of national interests and values. Some attempt is made, however, to safeguard the Community concept of personal mobility against these emanations of political fragmentation. The exception on grounds of public policy and public health, for instance, is subject to strict Community guidelines for its use,[25] although this control is undermined somewhat by the fact that member states are allowed to define, subject to the loose supervision of the Court of Justice, which are the requirements of public policy that justify it invoking the exception.[26] With respect to the exclusion of non-nationals from positions in the public service and from activities involving a connection with the exercise of official authority, the Court of Justice has placed quite stringent limitations on the second of these exceptions while leaving the first untrammelled in scope.[27] As a result some member states who have a broad definition of public service - it includes teachers in France and Germany, for example - are able to remove significantly more positions from the application of the Treaty. No restrictions are placed by Community law a priori on the use of the national security exception, but it can be examined by the Commission or challenged in the Court of Justice by either the Commission or another member state. All in all, it is possible to speak of a compromise, uneasy though it may be at times, between the demands of the supranational Community ideal and those of national self-interest.

Another emanation of national sovereignty are those general laws that disadvantage non-nationals but which are valid nonetheless because they can be objectively justified. In a way they represent a more potent obstacle to personal mobility than the exceptions, as they can affect any activity or employment and so remove it from exercise by non-nationals. Some headway has been made towards removing the discriminatory aspect of these general laws through harmonisation, but the problem still persists. A non-national pharmacist or accountant, for example, has no effective right to pursue his livelihood in the Community due to the lack of a directive on the mutual recognition of their qualifications.

Inadequacies in the Community provisions. In most cases where the secondary legislation offers inadequate protection to the non-national against discrimination in the host state, it is possible for the non-national to rely on the Treaty in order to make good the deficiency. It is not an ideal solution, however, as he will need to persuade the national court to refer the matter to the Court of Justice.[28] On other occasions where the secondary legislation grants rights that go beyond the scope of the Treaty, there is not even this recourse. Thus, the children of self-employed non-nationals, who are excluded from the application of Directive 77/486, are not entitled to the minority educational rights that it bestows on the children of non-national workers.

More troublesome are the gaps and inconsistencies in the Treaty itself, such as the exclusion of self-employed persons wishing to establish themselves temporarily in another member state, the need for recipients of services to reside in a state other than the one where the provider is established, the absence of any detailed provisions on the rights of non-E.E.C. employees or the right of self-employed persons to a continued right of residence, the singular treatment of domestic nationals, the exclusion of employees of domestic employers who are not providing services, and the apparent restriction of the right of equality to national treatment in the case of the self-employed and to conditions of work for employees. In most instances the Court has made good the inadequacies in the Treaty by a very liberal interpretation of the Treaty or by upholding the more generous legislation of the Council.[29] Some problems, however, remain, such as those involving temporary establishments, the location of recipients of services, employees of domestic employers and the precise rights of non-E.E.C. nationals.

Establishing the content of Community law. A final limitation with respect to the E.E.C. scheme of personal mobility is formal rather than substantive in nature and concerns the sources of Community law in the area. There is no comprehensive compilation of the provisions regulating personal mobility within the Community in any one place, nor does a piece of legislation or a Treaty provision on a certain topic necessarily spell out all the rights involved. The Treaty itself is not a *traité-loi* but a *traité-cadre* that sets out general principles that are supposed to be fleshed out by the secondary legislation. This legislation, however, is not always comprehensive and it is frequently issued in piecemeal fashion. There were five years between the regulation granting employees a right of continued residence and the directive giving the same right to self-employed persons, while the latter had to wait ten years in order to be accorded the same social security rights as employees. And both the Treaty and the secondary legislation are subject to the interpretation of the Court of Justice, which has used this power to crucial effect by its pronouncements on the direct applicability of the Treaty and its attempt to interpret all Community provisions in such a way as to give shape to a consistent concept of personal mobility embracing all the rights necessary to make it up. The result is that a person not familiar with the sources of Community law may have great difficulty in ascertaining what the law is in the area of personal mobility. This study is an attempt to present a compilation of the various personal mobility rights as they appear to exist as of December 31st 1982 within the European Economic Community. In some instances it has been possible to state definitively what the law is; in others reliance had to be placed on suggestion and conjecture.

Final Comments

In his book on international economic policy, J.E. Meade advances the theory that significant migration from one country to another will only occur when the material benefits outweigh the intangible costs of migration, among which he lists the possibility of assimilation in the host state, the conditions of work that can be expected there and the cultural, social and religious differences that will be encountered.[30] Within the European Community this theory holds true, for the largest migration has been that of workers from the impoverished south of Italy to the more prosperous northern member states. There has, of course, been some personal mobility between these northern states themselves, but on a much smaller scale. One has only to peruse the jurisprudence of the Court of Justice to see the discrepancy; for every Thieffry or Patrick there are countless Casagrandes, Bonaffinis, and Sagulos. And, although the exodus from the *mezzogiorno* would doubtless have taken place anyway, it has probably been encouraged by the elimination by Community law of some of the intangible costs of migration.

The value of the personal mobility provisions of the Community is thus open to question, for their effect would seem to have been to increase rather than decrease the economic disparities between the various regions of the Community.[31] By encouraging the concentration of the working population in the more prosperous areas, it has helped to consolidate their economic preeminence, while the ensuing depopulation of the poorer areas may well have rendered the problems that beset them even more intractable. As a population dwindles, social and public services are shut down, and the drop in available manpower and facilities makes an area even more unattractive for investors. Most insidiously of all, the migration of its nationals to richer lands gives a positive incentive to a government to do little to remedy the ills that call forth the migration; for not only does the exodus lessen the clamour for reform, it also leads to foreign currency remittances by the expatriates that become a significant factor in the recipient state's economic stability.

An effective way to counter this negative effect of personal mobility within the Community would be the coordination of national economic and social policies in order to level out the differences in the standard of living in the various member states and the adoption of a common regional policy to eradicate the gross imbalances between certain regions of the Community.[32] For only when a generally acceptable standard of living prevails throughout the Community will personal mobility become a matter of personal choice rather than economic necessity; only then will the Community provisions serve the people who migrate rather than the interests that presently dictate their migration.

But such developments have not yet proved possible.[33] Coordination of social policy has been achieved in certain areas of employment but little has been done to standardize social security systems. The attempts at a coordination of national economic policies have been a catalogue of lamentable failures, each ending in a monetary crisis. The initial attempt was based on a group of committees, and this system perished in the currency instability of 1968-1969. Next came the scheme to impose coordination by a strict control of currency parities, which rejoiced in the unlikely name of "the snake in the tunnel." This, too, perished in the monetary crisis of 1973-1975, which was unleashed by the rise in oil prices. The present attempt, based like the snake on the ill-conceived nation that coordination can be coerced by a common monetary system, seems likely to meet the same fate as its predecessors. Although this time there has been some concession to economic reality with the setting up of a sort of European reserve bank to assist member states in maintaining the value of their currencies, the scheme has recently been beset by Danish, Belgian and French devaluations beyond the 2.25% limit of permissible fluctuation. The United Kingdom is not even a member of this new European Monetary System, and the Franco-German cooperation upon which it is ultimately based is looking ever more fragile. As Smit and Herzog conclude, "the monetary union appears to have little chance of success in the long run unless it is accompanied by a high degree of coordination of economic policies."[34] Such coordination is as far away as ever. The attempts at a common regional policy have proved no more fruitful, foundering each time on the member states' perennial insistence on their own national priorities. Thus, despite its early promise, the European Economic Community has remained a free market of goods, services and labour with a ruinously expensive and inefficient common agricultural policy as its only achievement in the area of policy coordination. And even allowing for some spread of wealth to the poorer areas, it has essentially been to the advantage only of the more prosperous areas of the Member States.

This study must end, therefore, on a negative note, for beneath the impressive facade of legal niceties is a concept of personal mobility that has brought little benefit to the people of Europe. The most that can be said of the Community provisions is that they have improved the lot of those who have been forced by economic necessity to abandon their native soil. Theoretically it could also be said of them that they have encouraged the cause of peace by permitting the peoples of Europe to come to know each other. But mass migration more often than not reinforces popular prejudices, and history would indicate that intercourse between peoples does little to lessen the irrational will to make war. The French and English nobilities of the fourteenth and fifteenth centuries made ferocious war upon each other despite their common ancestry and traditions and their frequent intermarriages; the common perils and common achievements that should have bound together the American and Canadian settlers of the New World could not prevent the War of 1812; and even more recently, the world has been plunged into chaos and misery by the conflict between the two major Germanic peoples of northern Europe that not even centuries of peaceful intercourse and mutual esteem could avert. Nor does modern Europe demonstrate any tendency to gainsay the lessons of history, for little or no progress has been made toward political integration, while popular sentiment may be turning against the European ideal. Indeed the constellation of affairs is such that the most respected German political magazine has characterized Europe as being "in a state of sickness marked by the sure signs of approaching death."[35]

FOOTNOTES

Chapter 5

[1] These grounds are discussed in Chapter 2D, pp. 144-157.

[2] It has been suggested that the work connection may not be lacking in these circumstances - see Chapter 2A, 74-75, and p. 78 and Chapter 2B, p. 108.

[3] See the discussion of this point in Chapter 2A, pp. 66-67.

[4] Domestic employers may be covered by the Treaty even where they are not providing services in the host state - see Chapter 2A, pp. 74-75 and Chapter 2B, p. 108.

[5] See the discussion of this point in Chapter 2B, p. 96-97.

[6] See fn. 4.

[7] Self-employed persons can never qualify for a limited right of residence as their establishment in the host state must be permanent - see supra and Chapter 2A, p. 76 and Chapter 2B, p. 108.

[8] These criteria are discussed in Chapter 2B, pp. 93-94.

[9] See fn. 1.

[10] See supra.

[11] Expulsion on grounds of involuntary unemployment and incapacity is discussed in Chapter 2B, pp. 103-106.

[12] See the discussion of this point in Chapter 2B, p. 105.

[13] They may be held to be disproportionate where they apply to providers who are already subject to such prerequisites in their state of establishment - see Chapter 3B, pp. 225-227.

[14] The logic behind this particular dispensation is not entirely clear - see Chapter 3B, pp. 228-229.

[15] See the discussion of this point in Chapter 3B, pp. 198-200.

[16] These exceptions are discussed in Chapter 3E, pp. 292-295 and p. 297.

[17] See the discussion of the concept of personal mobility in Chapter 1, pp. 3-4.

[18] These petty but intricate restrictions are discussed in Chapter 4D, pp. 416-419.

[19] See Chapter 4B, pp. 347-348 and 4D, pp. 421-422.

[20] The right to equality of the resident on sufferance is discussed in Chapter 4E, pp. 440-444.

[21] The better view, it is suggested, is that a non-national has no right of access to such positions so that they are beyond the scope of the right to equality - see Chapter 3E, p. 299 and Chapter 4E, pp. 447-448.

[22] See the discussion of this possibility in Chapter 2A, p. 81.

[23] See the discussion of this problem in Chapter 2C, pp. 126-129.

[24] See supra and Chapter 1, pp. 6-10 and Chapter 2A, pp. 71-73 and Chapter 2B, p . 107.

[25] These guidelines are discussed in detail in Chapter 2D, pp. 144-157.

[26] See the discussion of the van Duyn case (41/74) in Chapter 2D, pp. 150-152.

[27] See the discussion of this exception in Chapter 3E , pp. 292-294.

[28] Under Article 177 of the Treaty only national courts of last instance are bound to refer matters that concern an interpretation of Community law to the Court of Justice, but even then they can avoid a reference by claiming that the law is clear enough to apply immediately.

[29] See the discussion of the Court's approach in Chapter 1, pp. 7-8 and pp. 29-37 and Chapter 4A, pp. 310-315.

[30] J.E. Meade, The Theory of International Economic Policy (London: Oxford University Press, 1955), II, p. 358.

[31] See Sidney Dell, Trade Blocs and Common Markets (1963), p. 84.

[32] See Bela Balassa, The Theory of Economic Integration (London: Allen and Unwin, 1973), p. 207. I am also indebted to Professor Balassa for his analysis of the effects of depopulation that are summarized above in the text.

[33] The attempts at the coordination of social and economic policy within the Community are discussed by Hans Smit and Peter Herzog, The Law of the European Economic Community (New York: Matthew Bender, 1976-1982), volume III.

[34] Smit and Herzog, op. cit. Suppl. to I, p. 1-13.

[35] Die Welt, Nr. 14, 9th April, 1982 (translated from the original German).

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APPENDIX

APPENDIX

COUNCIL DIRECTIVES ON SELF-EMPLOYED ACTIVITIES[1]

Directive	Liberalisation	Equalisation	Harmonisation
Agriculture and Horticulture 63/261/EEC, based on Article 54(2),(3).[2] Establishment[3] L-E[4]	(1):[5] Nationals of other MSS[6] who have worked for at least 2 years as paid agricultural workers may engage in agricultural activities per (4) free of the restrictions set out in Title III (4): Same rights as nationals re: property, aid, subsidies, credit, and membership in cooperatives.	(4): Same rights as nationals re: property, aid, subsidies, credit and membership and office in cooperatives. (4): Title III (6): No aid by MS of origin to nationals that distorts conditions of establishment.	None.
63/262/EEC, based on Article 54(2),(3).[7] Establishment L-E	(1): Persons per Title I may engage in agricultural activities on holdings left abandoned or uncultivated for more than 2 years per (4) free of the restrictions set out in Title III. (4): Same rights as nationals re: property, aid, subsidies, and credit with respect to holding referred to in (1). (4): Same rights as nationals re: membership and office in cooperatives.	(4): Title III (4): Same rights as nationals re: property, aid, subsidies, and credit with respect to holding referred to in (1). (4): Same rights as nationals re: membership and office in cooperatives. (6): No aid by MS of origin to nationals that distorts conditions of establishment. See, too, Directives 67/530, 68/415, 69/192.	None.

Directive	Liberalisation	Equalisation	Harmonisation
65/1/EEC, based on Article 63(2),(3).[8] Services L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) of certain agricultural and horticultural services. (4): No enrolment in commercial register or trade association of services not more than 90 days. (4): Same right as nationals to enrolment in commercial register or trade association. (5): Same rights as nationals re: credit, aid, subsidies, public contracts and authorisations for use of toxic or dangerous products.	(1): Title III (4): Same right as nationals to enrolment in commercial register or trade association but cannot hold high office in latter. (5): Same rights as nationals re: credit, aid, subsidies, taxation allowances, public contracts, and authorisations for use of toxic or dangerous products.	(6): Facilitation of proof of good character and no previous bankruptcy. See, too Directive 74/556 (Toxic Products).
67/530/EEC, based on Article 54(2),(3).[9] Establishment L-E	Affects beneficiaries of Directives 63/262 and 67/531.[10]	(1): Nationals and companies of other MSS who have pursued agricultural activities for more than 2 years may transfer from one holding to another free of all restrictions.[11]	None.

Directive	Liberalisation	Equalisation	Harmonisation
67/531/EEC, based on Article 54(2),(3)[12] Establishment L	(1): National and companies of other MSS that pursue or wish to pursue agricultural activities may obtain agricultural leases free of all restrictions.	See Directives 67/530, 68/415, 68/192, 67/532.	None.
67/532/EEC, based on Article 54(2),(3).[13] Establishment L-E	Affects beneficiaries of Directive 67/531.[14] (1): Nationals and companies of other MSS who pursue or wish to pursue agricultural activities shall have access to cooperatives free of all restrictions.	(1): Nationals and companies of other MSS who pursue or wish to pursue agricultural activities shall have access to cooperatives free of all restrictions, including holding high office therein.	None.
68/192/EEC, based on Article 54(2),(3).[15] Establishment L-E	Affects beneficiaries of Directives 67/531 and 63/262 + 67/530.[16] (1): Nationals and companies of other MSS who pursue or wish to pursue agricultural activities shall have access to credit free of all restrictions.[17]	(1): Nationals and companies of other MSS who pursue or wish to pursue agricultural activities shall have access to credit free of all restrictions.	None.

Directive	Liberalisation	Equalisation	Harmonisation
68/415/EEC, based on Article 54(2),(3)[18] Establishment L-E	Affects beneficiaries of Directives 67/531 and 63/262 + 67/530[19] (1): Nationals and companies of other MSS who pursue or wish to pursue agricultural activities shall have access to aid free of all restrictions.[20]	(1): Nationals and companies of other MSS who pursue or wish to pursue agricultural activities shall have access to aid free of all activities. (4): No aid by MS of origin to nationals that distorts conditions of establishment.	None.
71/18/EEC, based on Article 54(2),(3).[21] Establishment L-E-II	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) of certain agricultural and horticultural services. (4): Same rights as nationals re: credit, aid, subsidies, public contracts and authorisations for use of toxic or dangerous products. (5): Same rights as nationals to join trade and professional organisations.	(1): Title III. (4): Same rights as nationals re: credit, aid, subsidies, public contracts and authorisations for use of toxic or dangerous products. (5): Same right as nationals to join and hold high office in trade and professional organisations. (6): No aid by MS of origin to nationals that distorts conditions of establishment.	(7): Facilitation of proof of good character and repute and no previous bankruptcy. See, too, Directive 74/556 (Toxic Products).

Directive	Liberalisation	Equalisation	Harmonisation
Catering Industry 68/367/EEC, based on Articles 54(2),(3); 63(2),(3)[22] Establishment and Services L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to drinking, eating and lodging places. (2): Activities must be carried out habitually and by way of trade and not by itinerant trade - (see Directive 75/369 for itinerant trade). (4): Same right as nationals to join professional and trade organisations.	(1): Title III (4): Same right as nationals to form and hold high office (in the case of establishment) in professional and trade organisations. (5): No aid by MS of origin to nationals that distorts conditions of establishment.	(6): Facilitation of proof of good repute, no previous bankruptcy and financial standing. See, too, Directive 68/368.
68/368/EEC, based on Articles 54(2); 57; 63(2); 66[23] Establishment and Services H (Transitional)	(1): Affects beneficiaries of Directive 68/367.	None.	(4): Pursuit of activity in another MS is evidence of qualification. (5): Host state where no qualifications necessary may in case of difficulties require immigrants to meet requirements of MS of origin if Commission so authorises. (6): MS of origin to issue necessary certificate. (7): Directive inoperative once coordinating provisions come into force.

Directive	Liberalisation	Equalisation	Harmonisation
Coal Trade			
70/522/EEC, based on Articles 54(2),(3); 63(2),(3).[24] Establishment and Services L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to the wholesale coal trade. (5): Same rights as nationals to join professional trade organisations.	(1): Title III (5): Same rights as nationals to join and, in case of establishment, hold high office in professional trade organisations. (6): No aid by MS of origin to nationals that distorts conditions of establishment.	(7): Facilitation of proof of good repute and no previous bankruptcy. (8): Where oath necessary, formulation of an appropriate one for non-nationals.
70/523/EEC, based on Articles 54(2); 57; 63(2); 66[25] Establishment and Services H (Transitional)	(1): Affects beneficiaries of Directive 70/522.	None.	(2,3): Pursuit of activity in another MS is sufficient evidence of qualification. (4): MS of origin to issue necessary certificate. (5): Directive becomes inoperative once coordinating provisions come into effect.
Film Industry			
63/607//EEC, based on Article 63(2).[26] Services[27] L-E-H	(1): Persons per Title I benefit in respect of films having the nationality of a MS from the following measures: (5): No restrictions on importation, distribution and commercial exploitation of short films, newsreel films, and full-	(10): No discriminatory tax or equivalent measure to thwart application of directive.	(3,4): Criteria for establishing nationality of a MS for a film. (11): Exporting country to provide certificate of nationality.

Directive	Liberalisation	Equalisation	Harmonisation
	length films of documentary value or per (6) for exhibition in the original version with or without sub-titles. (7): Quota on importation, distribution and exploitation of full-length films dubbed in the language of the importing state not to be less than seventy films per film year.		
65/264/EEC, based on Articles 54(2),(3); 63(2)[28] Establishment and Services L-E	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect to: a) opening cinemas specialising in foreign films with or without subtitles by way of establishment; AND b) exhibiting films having the nationality of a MS,[29] (7) AND c) dubbing films prior to export (8).	(1): Title III (4): Same right as nationals re: aid (4): No aid by MS of origin to nationals that distorts conditions of establishment.	(2): Criteria for establishing nationality of a MS for a film.

Directive	Liberalisation	Equalisation	Harmonisation
68/369/EEC, based on Articles 54(2),(3).[30] Establishment L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to the distribution and renting of films. (5): Same right as nationals to join professional and trade organisations.	(1): Title III (5): Same right as nationals to join and hold high office in professional and trade organisations. (6): No aid by MS of origin to nationals that distorts conditions of establishment.	(4): Facilitation of proof of good repute and no previous bankruptcy. (4): Facilitation of proof of financial standing.
70/451/EEC, based on Articles 54(2),(3); 63(2),(3).[31] Establishment and Services L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to film production, except for persons directly involved with the producer in the making of the film. (5): Same right as nationals to join trade and professional organisations.	(1): Title III (4): No aid by MS of origin to nationals that distorts conditions of establishment. (5): Same right as nationals to join and, in case of establishment, to hold high office in trade and professional organisations.	(6): Facilitation of proof of good repute and no previous bankruptcy. (6): Facilitation of proof of financial standing.
Financial Institutions 73/183/EEC, based on Articles 54(2),(3); 61(2),(3).[32] Establishment and Services. L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to banks and other financial institutions. (4): Same right as nationals to join trade and professional organisations.	(1): Title III (4): Same right as nationals to join and, in case of establishment, hold high office in trade and professional organisations.	(5): Facilitation of proof of good repute and no previous bankruptcy. See, too, Directive 77/780.

Directive	Liberalisation	Equalisation	Harmonisation
77/780/EEC, based on Article 57.[33] Establishment H (Coordination)	No restrictions on establishment or services permitted after end of transitional period. (2): Affects taking up and pursuit of business of credit institutions.	None.	Coordination of the law, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions.[34]
Food Manufacturing and Beverage Industry 68/365/EEC, based on Articles 54(2),(3); 63(2),(3).[35] Establishment and Services L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to food manufacturing and beverage industry with the exception of medicinal and pharmaceutical products. (2): Includes right to sell own products both wholesale and retail. (2): excludes activities of itinerant traders. (See Directive 75/369 on Miscellaneous Activities). (4): Same right as nationals to join professional and trade organisations.	(1): Title III (4): Same right as nationals to join and, in cases of establishment, to hold high office in professional and trade organisations. (5): No aid by MS of origin to nationals that distorts conditions of establishment.	(6): Facilitation of proof of good repute and no previous bankruptcy. (6): Facilitation of proof of financial standing. See, too, Directive 68/366.

Directive	Liberalisation	Equalisation	Harmonisation
68/366/EEC, based on Articles 54(2); 57; 63(2); 66[36] Establishment and Services H (Transitional)	(1): Affects beneficiaries of Directive 68/365.	None.	(4): Pursuit of activity in another MS is evidence of qualification. (5): MS of origin to issue necessary certificate. (6): Host State where no qualifications necessary may in case of difficulty require immigrants to meet requirements of MS of origin, if Commission so authorises. (7): Directive becomes inoperative upon entry into force of coordinating provisions.
Forestry and Logging 67/654/EEC, based on Articles 54(2),(3); 63(2),(3)[37] Establishment and Services L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to forestry and logging. (2): excludes activities of itinerant traders (see Directive 75/369 on Miscellaneous Activities). (5): Same right as nationals to join professional and trade organisations.	(1): Title III (5): Same right as nationals to join and, in the case of establishment, to hold high office in professional and trade organisations. (7): No aid by MS of origin to nationals that distorts conditions of establishment.	(6): Facilitation of proof of good repute and no previous bankruptcy. See, too, Directive 74/556 (Toxic Products).

Directive	Liberalisation	Equalisation	Harmonisation
Hairdressing 82/489/EEC,* based on Articles 49; 57, 66.[38] Establishment and Services H (Transitional)	No restrictions on establishment or services permitted after the end of the transitional period. (1): Affects activities of haridressers. (7): Includes paid employees.	None.	(2): Pursuit of activity in another MS is evidence of qualification. (3): MS of origin to issue necessary certificate. (4): Facilitation of proof of good repute, no previous bankruptcy and financial standing.
Health Care Professions 75/362/EEC,* based on Articles 49; 57; 66; 235.[39] Establishment and Services. H (Mutual Recognition and Facilitation)[40]	Restrictions on doctors prohibited by Treaty since end of transitional period. (1): Affects all doctors. (20): Until 1986 non-nationals may be required to complete same 6 month training programme as nationals in order to become eligible for appointment as a medical practitioner of a social security scheme.[41] (24): Includes paid employees.	(20): Until 1986 non-nationals may be required to complete same 6 month training programme as nationals in order to become eligible for appointment as a medical practitioner of a social security scheme.[42]	(2): MSS will recognize general qualifications awarded to nationals of MSS by other MSS in accordance with (1) of Directive 75/363 and listed in (3) of this directive. (4): MSS will recognize general specialist qualifications awarded to nationals of MSS by other MSS in accordance with (2), (3), (4) and (8) of Directive 75/363 and listed in (5) of this directive. (6): MSS with provisions on the matter will recognize inter se particular specialist qualifications awarded to nationals of MSS by other MSS in accordance with (2), (3), (5) and (8) of Directive 75/363 and listed in (7) of this directive.

Directive	Liberalisation	Equalisation	Harmonisation
			(9.1): MSS will recognize general qualifications awarded to nationals of MSS by other MSS prior to the implementation of Directive 75/363 and which do not conform to (1) of Directive 75/363, provided they are accompanied by a certificate of practice for 3 consecutive years out of last 5 years.
			(9.2): MSS will recognize general or particular specialist qualifications awarded to nationals of MSS by other MSS prior to the implementation of Directive 75/363 and which do not conform to (2), (3), (4), and (5) of Directive 75/363, but host state may require a certificate of practice for a period equal to twice the difference in time between the specialist training in awarding state and the minimum training set down in Directive 75/363.
			(10): Non-national may use academic title of MS of origin, but per (18) must use professional title of host state where required.

Directive	Liberalising	Equalising	Harmonising
			(19): Where oath necessary, formulation of an appropriate one for non-nationals. (20): Host state responsible for seeing that a non-national acquires necessary linguistic competence.
	Establishment Only		
	(15): Host state must complete procedure for authorising establishment as soon as possible and in any case not later than 3 months.		(11): Facilitation of proof of good character or good repute. (13): Facilitation of proof of physical or mental health.
	Services Only		
	(11): (13): Implicit exemption from need to prove good character, good repute and physical or mental health.[43] (16): No need to join professional organisation or automatic membership that does not delay or complicate the provision of services and entail additional costs.[44] (16): No authorisation needed to provide services.	(17): No need to register with social security body in order to receive payment.	(16): Host state may require the following: -declaration that providing services -certificate that lawfully pursuing activity in MS of establishment -certificate that qualifications are recognized under this directive

Directive	Liberalisation	Equalisation	Harmonisation
	(16): Declaration that providing services may be made ex post facto. (17): No need to register with social security body in order to receive payment.		
75/363/EEC,* based on Articles 49; 57; 66; 235.[45] Establishment and Services II (Coordination)	(1): Affects beneficiaries of Directive 75/362 including per (6) paid employees.	None.	(1): General training requires: -guarantee of certain knowledge and experience -6 years or 5,500 hours of university training -pass university entrance -theoretical and practical instruction (2): Specialist training requires: -successful completion of general training -theoretical and practical instruction -full-time course (although per (3) part-time training is acceptable) -courses at a university, teaching hospital or equivalent -personal participation of trainee in activity and responsibilities of teaching establishment. (4,5): specified minimum length for all specialist training courses.

Directive	Liberalisation	Equalisation	Harmonisation
77/452/EEC,* based on Articles 49; 57; 66; 235.[46] Establishment and Services. H (Mutual Recognition and Facilitation)[47]	Restrictions on nurses prohibited by Treaty since end of transitional period. (1): Affects all nurses responsible for general care. (18): Includes paid employees.		(2): MSS will recognize general qualifications awarded to nationals of MSS by other MSS in accordance with (1) of Directive 77/453 and listed in (3) of this directive. (4): MSS will recognize general qualifications awarded to nationals of MSS by other MSS prior to the implementation of Directive 77/453 and which do not conform to (1) of Directive 77/453, provided they are accompanied by a certificate of practice for at least 3 out of last 5 years. (5): Non-national may use academic title of MS of origin, but per (13) must use professional title of host state where required. (14): Where oath necessary, formulation of an appropriate one for non-nationals. (15): Host state responsible for seeing that non-national acquires necessary linguistic competence.

Directive	Liberalisation	Equalisation	Harmonisation
	Establishment Only		
	(10): Host state must complete procedure for authorising establishment as soon as possible and in any case not later than 3 months.		(6): Facilitation of proof of good character or good repute. (8): Facilitation of proof of physical or mental health.
	Services Only		
	(6): (7): Implicit exemption from need to prove good character, good repute and physical or mental health.[48] (11): No need to join professional organisation. (11): No authorisation needed to provide services. (11): Declaration that providing services may be made *ex post facto*. (12): No need to register with social security body in order to receive payment.	(12): No need to register with social security body in order to receive payment.	(11): Host state may require the following: -declaration that providing services -certificate that lawfully pursuing activity in MS of establishment -certificate that qualifications recognized under this directive.

Directive	Liberalisation	Equalisation	Harmonisation
77/453/EEC,* based on Articles 49; 57; 66; 235[49] Establishment and Services H (Coordination)	(1): Affects beneficiaries of Directive 77/452 including per (3) paid employees.	None.	(1): Training requires: -guarantee of certain knowledge and experience via examination, school leaving examination, or nurses' training school entrance examination -full-time training of a specifically vocational nature (although per (2) part-time training is acceptable) -3 years or 4,600 hours -theoretical and practical instruction -must cover certain specified subjects
78/686/EEC,* based on Articles 49; 57; 66; 235[50] Establishment and Services H (Mutual Recognition and Facilitation)[51]	Restrictions on dentists prohibited by Treaty since end of transitional period. (1): Affects all dentists. (20): Until 1986 non-nationals may be required to complete same 6 month training programme as nationals in order to become eligible for appointment as a dental practitioner of a social security scheme.[52] (23): Includes paid employees.	(20): Until 1986 non-nationals may be required to complete same 6 month training programme as nationals in order to become eligible for appointment as a dental practitioner of a social security scheme.[53]	(2): MSS will recognize general qualifications awarded to nationals of MSS by other MSS in accordance with (1) of Directive 78/687 and listed in (3) of this directive. (4): MSS with provisions on the matter will recognize inter se particular specialist qualifications awarded to nationals of MSS by other MSS in accordance with (2) and (3) of Directive 78/687 and listed in (5) of this directive. (7.1): MSS will recognize general qualifications awarded to nationals of MSS by other MSS and which do not conform to (1) of Directive 78/687, provided

Directive	Liberalisation	Equalisation	Harmonisation
			they are accompanied by a certificate of practice for 3 consecutive years out of last 5 years.
			(7.2): MSS will recognize particular specialist qualifications awarded to nationals of MSS by other MSS prior to the implementation of Directive 78/687 and which do not conform to (2) and (3) of Directive 78/687, but host state may require a certificate of practice for a period equal to twice the difference in time between the specialist training in awarding state and the minimum training set down in Directive 78/687.
			(8): Non-national may use academic title of MS of origin, but per (17) must use professional title of host state where required.
			(18): Host state responsible for seeing that non-national acquires necessary linguistic competence.
		Establishment Only	
	(13): host state must complete procedure for authorising establishment as soon as possible and in any case not later than 3 months.		(9): Facilitation of proof of good character or good repute.

Directive	Liberalisation	Equalisation	Harmonisation
			(11): Facilitation of proof of physical or mental health. (14): Where oath necessary, formulation of an appropriate one for non-nationals.
	Services Only		
	(9): (11): Implicit exemption from need to prove good character, good repute and physical or mental health.[54] (15): No need to join professional organisation or automatic membership that does not delay or complicate the provision of services and entail additional costs. (15): No authorisation needed to provide services. (15): Declaration that providing services may be made ex post facto. (16): No need to register with social security body in order to receive payment.	(16): No need to register with social security body in order to receive payment.	(15): Host state may require the following: -declaration that providing services -certificate that lawfully pursuing activity in MS of establishment -certificate that qualifications are recognised under this directive.

Directive	Liberalisation	Equalisation	Harmonisation
78/687/EEC,* based on Articles 49; 57; 66; 235.[55] Establishment and Services H (Coordination)	(1): Affects beneficiaries of Directive 78/686 including per (7) paid employees.	None.	(1): General training requires: -guarantee of certain knowledge and experience -5 years -full-time -theoretical and practical instruction -at a university or equivalent -must cover certain specified subjects -pass university entrance (2): Specialist training requires: -successful completion of (1) -theoretical and practical instruction -full-time course (although per (3) part-time training is acceptable) -3 years minimum -at university or equivalent -personal participation of trainee in activity and responsibilities of teaching establishment
78/1026/EEC*, based on Articles 49; 57; 66; 235[56] Establishment and Services H (Mutual Recognition and Facilitation)[57]	Restrictions on veterinarians prohibited by Treaty since end of transitional period. (1): Affects all veterinarians. (17): Includes paid employees.	None.	(2): MSS will recognize general qualifications awarded to nationals of MSS by other MSS in accordance with (1) of Directive 78/1027 and listed in (3) of this directive. (4): MSS will recognize general qualifications awarded to

Directive	Liberalisation	Equalisation	Harmonisation
			nationals of MSS by other MSS prior to the implementation of Directive 78/1027 and which do not conform to (1) of Directive 78/1027, provided they are accompanied by a certificate of practice for 3 consecutive years out of last 5 years.
			(5): Non-national may use academic title of MS of origin, but per (13) must use professional title of host state where required.
			(14): Host state responsible for seeing that non-national acquires necessary linguistic competence.
Establishment Only			
	(10): host state must complete formalities for authorising establishment as soon as possible and in any case not later than 3 months.		(6): Facilitation of proof of good character or good repute.
			(8): Facilitation of proof of physical or mental health.
			(11): Where oath necessary, formulation of an appropriate one for non-nationals.
Services Only			
	(6): (8): Implicit exemption from need to prove good character, good repute and physical or mental health.[58]		(12): Host state may require the following:

Directive	Liberalisation	Equalisation	Harmonisation
	(12): No need to join professional organisation or automatic membership that does not delay or complicate the provision of services and entail additional costs. (12): No authorisation needed to provide services. (12): Declaration that providing services may be made _ex post facto_.		-declaration that providing services -certificate that lawfully pursuing activity in MS of establishment -certificate that qualifications are recognised under this directive
78/1027/EEC,* based on Articles 49; 57; 66; 235[59] Establishment and Services H (Coordination)	(1): Affects beneficiaries of Directive 78/1026, including per (2) paid employees.	None.	(1): General training requires: -guarantee of certain knowledge and experience -5 years -full-time -theoretical and practical instruction -at a university or equivalent -must cover certain specified subjects -past university entrance
80/154/EEC,* based on Articles 49; 57; 66[60] Establishment and Services H (Mutual Recognition and Facilitation)[61]	Restrictions on midwives prohibited by Treaty since end of transitional period. (1): Affects all midwives. (19): Includes paid employees.		(2): MSS will recognize general qualifications awarded to nationals of MSS by other MSS in accordance with (1) of Directive 80/155 and listed in (3) of this directive, provided that the person concerned has received:

Directive	Liberalisation	Equalisation	Harmonisation
			-3 years training either subject to possession of a university entrance examination or equivalent or followed by 2 years practice per (4), OR -2 years or 3,600 hours of full-time training subject to possession of nurse's qualifications as per Directive 77/452, OR -18 months or 3,000 hours of full-time training subject to possession of nurse's qualifications as per Directive 77/452 and followed by 1 year of practice per (4).
			(5): MSS will recognize general qualifications awarded to nationals of MSS by other MSS prior to and up to 6 years after notification of this directive and which do not conform to (1) of Directive 80/155, provided they are accompanied by a certificate of at least 3 years practice out of last 5 years.
			(6): Non-national may use academic title of MS of origin, but per (15) must use professional title of host state where required.
			(16): Host state responsible for seeing that non-national acquires necessary linguistic competence.

Directive	Liberalisation	Equalisation	Harmonisation
		Establishment Only	
	(11): Host state must complete procedure for authorising establishment as soon as possible and in any case not later than 3 months.		(7): Facilitation of proof of good character or good repute. (9): Facilitation of proof of physical or mental health. (12): Where oath necessary, formulation of an appropriate one for non-nationals.
		Services Only	
	(7): Implicit exemption from (9): need to prove good character, good repute and physical or mental health.[62] (13): No need to join professional organisation. (13): No authorisation needed to provide services. (13): Declaration that providing services may be made ex post facto. (14): No need to register with social security body in order to receive payment.	(14): No need to register with social security body in order to receive payment.	(13): Host state may require the following: -declaration that providing services -certificate that lawfully pursuing activity in MS of establishment -certificate that qualifications recognized under this directive

Directive	Liberalisation	Equalisation	Harmonisation
80/155/EEC,* based on Articles 49; 57; 66.[63] Establishment and Services H (Coordination)	(1): Affects beneficiaries of Directive 80/154, including per (5) paid employees.	None.	(1): General training requires: -guarantee of certain knowledge and experience -EITHER 3 year full-time (or per (3) part-time) practical and theoretical course subject to completion of high school, OR 18 months full-time (or per (3) part-time) course of same type subject to possession of nurse's qualifications as per Directive 77/452 -must include certain specified subjects
Insurance			
64/225/EEC, based on Articles 54(2),(3); 63(2).[64] Establishment and Services. L-E	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to reinsurance and retrocession.	Title III.	None.
73/239/EEC, based on Article 57(2)[65] Establishment H (Coordination)	(1): Delimits area of liberalisation for beneficiaries of Directive 73/240.	None.	Coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of direct insurance other than life insurance.[66]

Directive	Liberalisation	Equalisation	Harmonisation
73/240/EEC, based on Article 54(2),(3).[67] Establishment L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (1) of Directive 73/239[68] to direct insurance other than life insurance. (4): Same right as nationals to join professional and trade organisations.	(1): Title III. (4): Same right as nationals to join and hold high office in professional and trade organisations. (5): No aid by MS of origin to nationals that distorts conditions of establishment.	(3): Facilitation of proof of good repute and no previous bankruptcy. See Directive 73/239.
77/92/EEC,* based on Articles 49; 57; 66; 235.[69] Establishment and Services H (Transitional)	No restrictions on establishment or services permitted after the end of the transitional period. (2): Affects activities of insurance agents and brokers. (1): Includes paid employees.	None.	(4,5,6,7): Pursuit of activity in another MS is evidence of qualification. (9): MS of origin to issue necessary certificate. (10): Facilitation of proof of good repute, no previous bankruptcy and financial standing. (11): Where oath necessary, formulation of an appropriate one for non-nationals. (12): Directive inoperative once coordinating provisions come into force.

Directive	Liberalisation	Equalisation	Harmonisation
79/267/EEC, based on Articles 49; 57.[70] Establishment H (Coordination and Facilitation)	No restrictions on establishment permitted after end of transitional period.[71] (1): Affects taking up and pursuit of direct life insurance.	None.	Coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of direct life assurance.[72] (37): Facilitation of proof of good repute and no previous bankruptcy.
Lawyers			
77/249/EEC,* based on Articles 57; 66.[73] Services H (Facilitative)[74]	No restrictions on the provision of services permitted after end of transitional period. (1): Affects activities of lawyers providing services. (2): Implies that includes paid employees. (1): Not include preparation of of probate and land conveyances or notaries.[75] (4): No prior residence or registration with professional organisation may be required.	None.	(2): MSS recognize each other's lawyers.[76] (3): Lawyer use title of MS of origin. (4): Lawyer subject to rules of professional conduct of host state and state of origin. (5): Host state may require introduction to relevant Bar and that work be done in conjunction with local lawyer.

Directive	Liberalisation	Equalisation	Harmonisation
Manufacturing and Processing Industry			
64/427/EEC, based on Articles 54(2); 57; 63(2); 66[77] Establishment and Services H (Transitional)	(1): Affects beneficiaries of Directive 64/429.	None.	(3): Pursuit of activity in another MS is evidence of qualification. (4): MS of origin to issue necessary certificate. (5): Host state where no qualifications necessary may in case of difficulties require immigrants to meet requirements of MS of origin if Commission so authorises. (6): Directive inoperative once coordinating provisions come into force.
64/429/EEC, based on Articles 54(2),(3); 63(2),(3).[78] Establishment and Services L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to manufacturing and processing with the exception per (3) of medical and pharmaceutical products. (2): Liberalisation includes the right of the manufacturer to sell own products retail	(1): Title III. (5): Same right as nationals to join and, in the case of establishment, to hold high office in professional and trade organisations. (6): No aid by MS of origin to nationals that distorts conditions of establishment.	(7): Facilitation of proof of good repute, no previous bankruptcy and financial standing. *See*, too, Directive 64/427.

Directive	Liberalisation	Equalisation	Harmonisation
	or wholesale, but where general trade in these products is not already liberalised, the manufacturer is restricted to selling from a single establishment.[79] (5): Same right as nationals to join professional or trade organisations.	See, too, Directive 71/304 (Public Works Contracts)	
Mining, Quarrying, Prospecting and Drilling 64/428/EEC, based on Articles 54(2),(3); 63(2),(3).[80] Establishment and Services L-E-II	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to mining and quarrying with the exception per (3) of drilling and prospecting for crude oil and natural gas without a production licence. (See Directive 69/82). (2): Liberalisation includes the right of the producer to sell own products, retail or wholesale, but where general trade in these products is not already liberalised the product is restricted to selling from a single establishment.[81]	(1): Title III (5): No aid by MS of origin to nationals that distorts conditions of establishment.	(6): Facilitation of proof of good repute, no previous bankruptcy and financial standing.

Directive	Liberalisation	Equalisation	Harmonisation
69/82/EEC, based on Articles 54(2),(3); 63(2),(3).[82] Establishment and Services L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to prospecting and drilling for petroleum and natural gas.	(1): Title III. (4): No aid by MS of origin to nationals that distorts conditions of establishment.	(6): Facilitation of proof of good repute, no previous bankruptcy and financial standing.
Miscellaneous Activities			
63/340/EEC, based on Articles 63; 106(2).[83] Services L-E	(1): Abolition of restrictions in respect of payments for exchange of services where restrictions alone prohibit or impede the provision of services. (3): Not apply to exchange allowances for tourists.	(1): Abolition of restrictions in respect of payments for exchange of services where restrictions alone prohibit or impede the provision of services. (3): Not apply to exchange allowances for tourists.	None.
75/368/EEC,* based on Articles 49; 57; 66; 235.[84] Establishment and Services H (Transitional and Facilitation)	(1): Includes paid employees. (2): Affects various activities not covered by other directives[85] but now liberalised pursuant to Treaty with the exception of toxic products (see Directive 74/556) and itinerant trade (see Directive 75/369).	None.	(3): Facilitation of proof of good repute, no previous bankruptcy and financial standing. (4,5,7): Pursuit of activity in another MS is evidence of qualification. (9): MS of origin to issue necessary certificate. (11): Directive inoperative once coordinating provisions come into force.

Directive	Liberalisation	Equalisation	Harmonisation
75/369/EEC,* based on Articles 49; 57; 66; 235.[86] Establishment and Services. H (Transitional and Facilitative)	(1): Paid employees also included. (2): Affects itinerant activities which are now liberalised pursuant to the Treaty.	None.	(3): Facilitation of proof of good repute, no previous bankruptcy and financial standing. (5,6): Pursuit of activity in another MS is evidence of qualification. (8): MS of origin to issue certificate. (11): Directive inoperative once coordinating provisions come into force.
Public Utilities 66/162/EEC, based on Articles 54(2),(3); 63(2),(3).[87] Establishment and Services. L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to production, distribution and transmission or transportation of electricity, gas, water, and steam, and provision of sanitary services. (3): Excludes construction work (see Directive 64/429 on Manufacturing and Processing) and exploitation of natural gas (see 69/286 on Mining, Quarrying etc.) (6): Same right as nationals to join professional and trade organisations.	(1): Title III (5): Same right as nationals to join and, in case of establishment, to hold high office in professional and trade organisations. (6): No aid by MS of origin to nationals that distorts conditions of establishment.	(7): Facilitation of proof of good repute, no previous bankruptcy and financial standing.

Directive	Liberalisation	Equalisation	Harmonisation
Public Works			
71/304/EEC, based on Articles 54(2); 63(2).[88] Establishment and Services L-E	(1): Affects beneficiaries of Directive 64/429 pursuing or wishing to pursue construction activities.[89] (1): Natural persons and companies per Title I are freed from Title III restrictions on right to be involved in public works contracts, including in particular per (3) prohibition of technical specifications that applicable irrespective of nationality but whose exclusive or principal aim is to discriminate against non-nationals. (3): Same right as nationals to various forms of credit, aid and subsidies and to access to public supply facilities needed for performance of contract.	(1): Natural persons and companies per Title I are freed from Title III restrictions on right to be involved in public works contracts, including in particular per (3) prohibition of technical specifications that applicable irrespective of nationality but whose exclusive or principal aim is to discriminate against non-nationals. (3): Same right as nationals to various forms of credit, aid and subsidies and to access to public supply facilities needed for performance of contract.	See Directive 71/305.
71/305/EEC, based on Articles 57(2); 66; 100[90] Establishment and Service H (Coordination)	(1): Affects beneficiaries of Directives 64/429 and 71/304. (7): Only applies to contracts of estimated value of 1,000,000 EUA net of VAT.[91]	None.	Coordination of procedures for the award of public works contracts.[92]

Directive	Liberalisation	Equalisation	Harmonisation
Real Estate and Other Business Activities			
67/43/EEC, based on Articles 54(2),(3); 63(2),(3).[93] Establishment and Services L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect to: -real estate (2), AND -other business services (3).[94] (6): Same right as nationals to join professional and trade organisations.	(1): Title III. (6): Same right as nationals to join and, in case of establishment, hold high office in professional and trade organisations. (7): No aid by MS of origin to nationals that distorts conditions of establishment.	(8): Facilitation of proof of good repute, no previous bankruptcy and financial standing. (9): Where oath necessary, formulation of an appropriate one for non-nationals.
Toxic Products			
74/556/EEC,* based on Articles 49; 54; 57; 63(2); 66; 235.[95] Establishment and Services H (Transitional)	(1): Affects beneficiaries of following directives:[96] 65/1 (Agriculture and Horticulture) 67/654 (Forestry and Logging) 71/18 (Agriculture and Horticulture) 74/557 (Toxic Products) 75/368 (Miscellaneous Activities) (1): Includes paid employees.	None.	(2,3): Pursuit of activity in another MS is evidence of qualification. (4): MS of origin to issue necessary certificate. (6): Directive becomes inoperative once coordinating provisions come into force.
74/557/EEC, based on Articles 54(2),(3); 63(2),(3).[97] Establishment and Services L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) of trade and distribution of toxic products that were excluded from the scope of following directives:	(1): Title III (5): Same right as nationals to join and, in case of establishment, to hold high office in professional and trade organisations.	(7): Facilitation of proof of good repute, no previous bankruptcy and financial standing. See, too, Directive 74/556.

Directive	Liberalisation	Equalisation	Harmonisation
	64/223 64/224 68/363 Wholesale and Retail Trade (1): Not apply to itinerant trade. (See Directive 75/369 or Miscellaneous Activities). (5): Same right as nationals to join professional and trade organisations.	(6): No aid to MS of origin to nationals that distorts conditions of establishment.	
Transport, Travel, Storage and Warehousing			
82/470/EEC,* based on Articles 49; 57; 66.[98] Establishment and Services H (Transitional and Facilitative)	No restrictions on establishment or services permitted after the end of the transitional period. (1): Applies to natural persons and companies per Title I. (1): Includes paid employees. (2): Affects transport and travel agencies, storage and warehousing.	None.	(4): Facilitation of proof of good repute, no previous bankruptcy and financial standing. (6): Pursuit of activity in another MSS is evidence of qualification. (7): MS of origin to issue necessary certificate.
Wholesale and Retail Trade			
64/222/EEC, based on Articles 54(2); 57; 68(2): 66.[99] Establishment and Services. H (Transitional)	(1): Affects beneficiaries of Directives 64/223 and 64/224.	None.	(2): Pursuit of activity in another MS is evidence of qualification. (3): Host state where no qualifications may in case of difficulties

Directive	Liberalisation	Equalisation	Harmonisation
			require immigrants to meet requirements of MS of origin if Commission so authorizes. (4): MS of origin to issue necessary certificate. (5): Directive becomes inoperative once coordinating provisions come into effect.
64/223/EEC, based on Articles 54(2),(3); 63(2),(3).[100] Establishment and Services L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to wholesale trade with the exception of trade in medicinal and pharmaceutical products, toxic products (see Directive 74/557 on Miscellaneous Activities) and coal (see Directive 70/522 on Coal Trade). (4): Same right as nationals to join professional and trade organisations.	(1): Title III. (4): Same right as nationals to join and, in case of establishment, hold high office in professional and trade organisations. (5): No aid by MS of origin to nationals that distorts conditions of establishment.	(8): Facilitation of proof of good repute and no previous bankruptcy. See, too, Directive 64/222.

Directive	Liberalisation	Equalisation	Harmonisation
64/224/EEC, based on Articles 54(2),(3); 63(2),(3).[101] Establishment and Services L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) of activities of commercial agents with the exception per (4) of: -insurance (see Directive 73/240) -real estate (see Directive 67/43) -financial institutions (see Directive 73/183) -medicinal and pharmaceutical products -coal (see Directive 70/522) (2): Includes itinerant traders. (6): Same rights as nationals to join trade and professional organisations.	(1): Title III. (6): Same rights as nationals to join and, in the case of establishment, to hold high office in trade and professional organisations. (7): No aid by MS of origin to nationals that distorts conditions of establishment.	(8): Facilitation of proof of good repute and no previous bankruptcy. See, too, Directive 64/222.
68/363/EEC, based on Articles 54(2),(3); 63(2),(3).[102] Establishment and Services L-E-H	(1): Natural persons and companies per Title I are freed from Title III restrictions with respect per (2) to retail trade with the exemption of trade in medicinal and pharmaceutical products, toxic products (see Directive 74/557 on Miscellaneous Activities), tobacco and salt.[103]	(1): Title III. (6): Same rights as nationals to join and, in case of establishment, hold high office in professional and trade organisations. (7): No aid by MS of origin to nationals that distorts conditions of establishment.	(8): Facilitation of proof of good repute, no previous bankruptcy and financial standing. See, too, Directive 68/364.

Directive	Liberalisation	Equalisation	Harmonisation
	(2): Includes itinerant traders. (6): Same rights as nationals to join trade and professional organisations.		
68/364/EEC, based on Articles 54(2); 57; 63(2); 66.[104] Establishment and Services H (Transitional)	(1): Affects the beneficiaries of Directive 68/363.	None.	(4): Pursuit of activity in another MS is evidence of qualification. (5): Host state where no qualifications may in case of difficulties require immigrants to meet requirements of MS of origin if Commission so authorises. (6): MS of origin to issue necessary certificate. (7): Directive becomes inoperative once coordinating provisions come into effect.

FOOTNOTES TO APPENDIX

[1] Directives marked by an asterisk apply to employed persons as well.

[2] Laying down detailed provisions for the attainment of freedom of establishment in agriculture in the territory of a Member State in respect of nationals of other countries of the Community who have been employed as paid agricultural workers in that Member State for a continuous period of two years. Dated 2 April 1963, 1963 J.O. 1323 (Sp. Edn., 1963-1964, p. 19).

[3] The directives concern either establishment or services separately or both together. The scope of each particular directive is indicated here.

[4] L.E.H. indicate respectively whether the directive contains any liberalising, equalising or harmonising provisions. Liberalising provisions are those which aim at the elimination of national measures that prevent a non-national from exercising his rights to earn a livelihood. Harmonising provisions are those that make it possible for non-nationals to conform to the conditions attached by the host state to the exercise of the right. Equalising provisions assure the non-national's right to pursue his livelihood on an equal footing with nationals.

[5] The arabic numerals in brackets refer to the pertinent article in the directive.

[6] MS and MSS stand respectively for Member State and Member States.

[7] Laying down detailed provisions for the attainment of freedom of establishment on agricultural holdings abandoned or left uncultivated for more than two years. Dated 2 April 1963, 1963 J.O. 1326 (Sp. Edn., 1963-1964, p. 22).

[8] Laying down detailed provisions for the attainment of freedom to provide services in agriculture and horticulture. Dated 14 December 1965, 1965 J.O. 1 (Sp. Edn., 1965-1966, p. 3).

[9] Concerning the freedom of nationals of a Member State established as farmers in another Member State to transfer from one holding to another. Dated 25 July 1967, 1967 J.O.L/190, p. 1 (Sp. Edn., 1967, p. 228).

[10] The beneficiaries of Directive 63/261 already possess this right.

[11] This is an equalising and not a liberalising directive, as it only extends the rights of persons who already have an existing right to pursue their livelihood as a result of Directive 63/262 or 67/531; it does not create a right of livelihood for any new class of beneficiary.

[12] Concerning the application of the laws of Member States relating to agricultural leases to farmers who are nationals of other Member States. Dated 25 July 1967, 1967 J.O.L/190, p. 1 (Sp. Edn., 1967, p. 228).

[13] Concerning freedom of access to cooperatives for farmers who are nationals of one Member State and established in another Member State. Dated 25 July, 1967, 1967 J.O.L/190, p. 5 (Sp. Edn., 1967, p. 232).

[14] The beneficiaries of Directives 63/261 and 63/262 already enjoy this right by virtue of Article 4 of the directives.

[15] *Concerning freedom of access to the various forms of credit for farmers who are nationals of one Member State and established in another Member State*. Dated 5 April 1968, 1968 J.O.L/93, p. 13 (Sp. Edn., 1968, p. 91).

[16] The preamble to Directive 68/192 claims that the beneficiaries of Directive 63/262 already enjoy unrestricted access to credit, but this is not so. Pursuant to Article 4 of Directive 63/262 access to credit is only with respect to abandoned or uncultivated land, and Directive 67/530, which gives the beneficiaries of Directive 63/262 the right of free transfer, does not provide for a correspondingly wider access. Directive 68/192 is thus necessary if such persons wish to obtain credit for land which does not conform to Directive 63/262. It should be noted, however, that this will be only an equalising measure, for beneficiaries of Directive 63/262 who avail themselves of Directive 67/530 will already be pursuing their livelihood under the former directive.

[17] This is a liberalising measure for beneficiaries of Directive 57/531 if access to credit is a prerequisite for obtaining a lease, unless they are already exercising their livelihood pursuant to Directive 63/262.

[18] *Concerning freedom of access to the various forms of aid to farmers who are nationals of one Member State and established in another Member State*. Dated 20 December 1968, 1968 J.O. L/308, p. 17 (Sp. Edn., 1968, p. 589).

[19] See fn. 16 with respect to aid in this case.

[20] See fn. 17 with respect to aid in this case.

[21] *Laying down detailed provisions for the attainment of freedom of establishment in respect of self-employed persons providing agricultural and horticultural services*. Dated 16 December 1970, 1971 J.O.L/8, p. 24 (Sp. Edn., 1971, p. 23).

[22] *Concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in the personal services sector*. Dated 15 October 1968, 1968 J.O.L/260, p. 16 (Sp. Edn., 1968, p. 513).

[23] *Laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in the personal services sector*. Dated 15 October 1968, 1968 J.O.L/260, p. 19 (Sp. Edn., 1968, p. 517).

[24] *Concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in the wholesale coal trade and activities of intermediaries in the coal trade*. Dated 30 November 1970, 1970 J.O.L/267, p. 14 (Sp. Edn., 1970, p. 831).

[25] *Laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in the wholesale coal trade and in respect of activities of intermediaries in the coal trade.* Dated 30 November 1970, 1970 J.O.L/267, p. 18 (Sp. Edn., 1970, p. 835).

[26] *Implementing in respect of the film industry the provisions of the General Programme for the abolition of restrictions on freedom to provide services*. Dated 15 October 1963, 1963 J.O. 2661 (Sp. Edn., 1963-1964, p. 42).

[27] The exportation of films for distribution and commercial exploitation in another member state is considered to constitute the provision of a service rather than the export of goods - *see* Preamble to Directive 63/607.

[28] *Implementing in respect of the film industry the provisions of the General Programme for the abolition of restrictions on freedom of establishment and freedom to provide services*. Dated 13 May 1965, 1965, J.O. 1437 (Sp. Edn., 1965-1966, p. 62).

[29] This provision abolishes the quota of seventy full-length foreign films for exhibition in the language of the importing country that was set by Article 7 of Directive 63/607.

[30] *Concerning the attainment of freedom of establishment in respect of activities of self-employed persons in film distribution*. Dated 15 October 1968, 1968 J.O.L/260, p. 22 (Sp. Edn., 1968, p. 520).

[31] *Concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in film production*. Dated 29 September 1970, 1970 J.O.L/218, p. 37 (Sp. Edn., 1970, p. 620).

[32] *On the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self-employed activities of banks and other financial institutions*. Dated 28 June 1973, 1973 O.J.L/194, p. 1.

[33] *On the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions*. Dated 12 December 1977, 1977 O.J.L/322, p. 30.

[34] Details of this coordination are discussed in Chapter 3C, pp. 257-258.

[35] *Concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in the food manufacturing and beverage industries*. Dated 15 October 1968, 1968 J.O.L/260, p. 9 (Sp. Edn., 1968, p. 505).

[36] *Laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in the food manufacturing and beverage industries*. Dated 15 October 1968, 1968 J.O.L/260, p. 12 (Sp. Edn., 1968, p. 509).

[37] *Laying down detailed provisions for the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in forestry and logging*. Dated 24 October 1967, 1967 J.O.L/263, p. 6(Sp. Edn., 1967, p. 287).

[38] *Laying down measures to facilitate the effective exercise of the right of establishment and freedom to provide services in hairdressing*. Dated 19 July 1982, 1982 O.J.L/218, p. 24.

[39] *Concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services*. Dated 16 June 1975, 1975 O.J.L/67, p. 1.

[40] Although this directive is primarily a harmonising directive, it contains certain liberalising and equalising provisions that give closer articulation to rights that flow directly from the Treaty - *see* Chapter 3C, p. 254.

[41] The liberalising effect of this scheme is discussed in Chapter 3B, p. 235.

[42] The equalising effect of this scheme is discussed in Chapter 4B, p. 340.

[43] *See* the discussion in Chapter 3B, pp. 227-228.

[44] As amended by Directive 82/76, 1982 O.J.L/43, p. 21.

[45] *Concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors*. Dated 16 June 1975, 1975 O.J.L/169, p. 14.

[46] *Concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of nurses responsible for general care, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services*. Dated 27 June 1977, 1977 O.J.L/176, p. 1.

[47] *See* fn. 40.

[48] *See* fn. 43.

[49] *Concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of nurses responsible for general care*. Dated 27 June 1977, 1977 O.J.L/176, p. 8.

[50] *Concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services*. Dated 25 July 1978, 1978 O.J.L/233, p. 1.

[51] *See* fn. 40.

[52] *See* fn. 41.

[53] *See* fn. 42.

[54] *See* fn. 43

[55] *Concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of dental practitioners*. Dated 25 July 1978, 1978 O.J.L/233, p. 10.

[56] *Concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in veterinary medicine including measures to facilitate the effective exericse of the right of establishment and freedom to provide services*. Dated 18 December 1978, 1978 O.J.L/362, p. 1.

[57] *See* fn. 40.

[58] *See* fn. 43.

[59] *Concerning the coordination of provisions laid down by law, regulation or administrative action in respect of the activities of veterinary surgeons*. Dated 18 December 1978, 1978 O.J.L/362, p. 7.

[60] *Concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in midwifery and including measures to facilitate the effective exercise of the right of establishment and freedom to provide services*. Dated 21 January 1980, 1980 O.J.L/33, p. 8.

[61] *See* fn. 40.

[62] *See* fn. 43.

[63] *Concerning the coordination of provisions laid down by law, regulation or administrative action relating to the taking up and pursuit of the activities of midwives*. Dated 21 January 1980, 1980, O.J.L/33, p. 8.

[64] *On the abolition of restrictions of freedom of establishment and freedom to provide services in respect of reinsurance and retrocession*. Dated 15 February, 1964, 1964 J.O. 878 (Sp. Edn., 1963-1964, p. 131).

[65] *On the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life insurance*. Dated 24 July 1973, 1973 O.J.L/228, p. 3.

[66] Details of this coordination are discussed in Chapter 3C, pp. 256-257.

[67] *Abolishing restrictions on freedom of establishment in the business of direct insurance other than life insurance*. Dated 24 July 1973, 1973 O.J.L/228, p. 20.

[68] Somewhat unusually - and inconveniently - the scope of this liberalisation is delineated in Coordination Directive 73/239.

[69] *On measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers and, in particular, transitional measures in respect of those activities.* Dated 13 December 1976, 1977 O.J.L/26, p. 14.

[70] *On the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life insurance.* Dated 5 March 1979, 1979 O.J.L/63, p. 1.

[71] The *Reyners* decision (2/74) obviated the need with respect to direct life insurance for a counterpart to Directive 73/240.

[72] Details of this coordination are discussed in Chapter 3C, pp. 256-257.

[73] *To facilitate the effective exercise by lawyers of freedom to provide services.* Dated 22 March 1977, 1977 O.J.L/78, p. 17.

[74] Although the directive is primarily a harmonising directive, it contains certain liberalising provisions that give closer articulation to rights that flow directly from the Treaty - *see* Chapter 3C, pp. 267-268.

[75] These matters are thus effectively excluded from the scope of the Treaty right to provide legal services - *see* Chapter 3C, pp. 267-268.

[76] This provision does not amount to mutual recognition of qualifications; it is merely an acknowledgement of the person's status in his home state. Thus, the foreign lawyer is required by Article 3 of the directive to use his domestic title.

[77] *Laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries.* Dated 7 July 1964, 1964 J.O. 1863 (Sp. Edn., 1963-1964, p. 148).

[78] *Concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in manufacturing and processing industries.* Dated 7 July 1964, 1964 J.O. 1880 (Sp. Edn., 1963-1964, p. 155).

[79] A similar provision is found in Article 2 of Directive 64/428 on Mining and Quarrying. The aim of the restriction to a single outlet is to avoid creating a disturbance in a market that has not yet been liberalised. With respect to Directive 64/429, wholesale trade was already liberalised by Directive 64/223 with the exception of trade in toxic products, which was liberalised by Directive 74/557; retail trade was liberalised by Directive 68/363 with the same exception for trade in toxic products.

[80] *Concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in mining and quarrying*. Dated 7 July 1964, 1964 J.O. 1871 (Sp. Edn., 1963-1964, p. 151).

[81] *See* fn. 79. At the time of the issuance of Directive 64/428, the wholesale trade was already liberalised pursuant to Directive 64/223 except for the wholesale coal trade, which was liberalised by Directive 70/522. The retail trade was not liberalised until the issuance of Directive 68/363.

[82] *Concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons engaged in exploration (prospecting and drilling) for petroleum and natural gas*. Dated 13 March 1969, 1969 J.O.L/68, p. 4 (Sp. Edn., 1969, p. 111).

[83] *On the abolition of all prohibitions on or obstacles to payment for services when the only restrictions on exchange of services are those governing such payments*. Dated 31 May 1963, 1963 J.O. 1609 (Sp. Edn., 1963-1964, p. 31).

[84] *On measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of various activities, in particular, transitional measures in respect of these activities*. Dated 16 June 1974, 1975 O.J.L/167, p. 22.

[85] A list of the activities covered by the directive is found in the Annex. It is not exhaustive of all the activities that were not liberalised pursuant to directives under Articles 54(2) and 63(2) of the Treaty.

[86] *On measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of itinerant activities and, in particular, transitional measures in respect of these activities*. Dated 16 June 1975, 1975 O.J.L/167, p. 29.

[87] *Concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons engaging in the provision of electricity, gas, water and sanitary services*. Dated 28 February 1966, 1966 J.O. 584 (Sp. Edn., 1965-1966, p. 93).

[88] *Concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches*. Dated 26 July 1971, 1971 J.O.L/185, p. 1 (Sp. Edn., 1971, p. 678).

[89] Restrictions in respect of the award of public works contracts are abolished by Directive 64/429 except where they concern participation in public works contracts by way of provision of services or through agencies or branches. Directive 71/304 removes these remaining restrictions - *see* Preamble to Directive 71/304.

[90] *Concerning the coordination of procedures for the award of public works contracts*. Dated 26 July 1971, 1971 J.O.L/185, p. 5 (Sp. Edn., 1971, p. 682).

[91] As amended by Directive 78/619, 1978 O.J.L/225, p. 41.

[92] Details of this coordination are discussed in Chapter 3C, pp. 260-261.

[93] *Concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons concerned with* 1. *matters of "real estate".* 2. *The provision of certain "business services not elsewhere classified*." Dated 12 January 1967, 1967 J.O. 140 (Sp. Edn., 1967, p. 3).

[94] These are listed in Annex I of the *General Programme for the abolition of restrictions on freedom of establishment*.

[95] *Laying down detailed provisions concerning transitional measures relating to activities, trade in, and distribution of toxic products and activities entailing the professional use of such products including activities of intermediaries*. Dated 4 June 1974, 1974 O.J.L/307, p. 1.

[96] The use of toxic products in the course of activities that were liberalised pursuant to Directive 64/426 (Manufacturing and Processing) and 68/365 (Food Industry) is governed by the transitional measures set out in Directives 64/427 and 68/366 respectively - *see* Preamble to Directive 74/556.

[97] *On the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons and of intermediaries engaging in the trade and distribution of toxic products*. Dated 4 June 1974, 1974 O.J.L/307, p. 5.

[98] *On measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in certain services incidental to transport and travel agencies and in storage and warehousing*. Dated 29 June 1982, 1982 O.J.L/213, p. 1.

[99] *Laying down detailed provisions concerning transitional measures in respect of activities in wholesale trade and activities of intermediaries in commerce, industry and small craft industries*. Dated 25 February 1964, 1964 J.O. 857 (Sp. Edn., 1963-1964, p. 120).

[100] *Concerning the attainment of freedom of establishment and freedom to provide services in respect of activities in wholesale trade*. Dated 25 February 1964, 1964 J.O. 863 (Sp. Edn., 1963-1964, p. 123).

[101] *Concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of intermediaries in commerce, industry and small craft industries*. Dated 25 February 1964, 1964 J.O. 869 (Sp. Edn., 1963-1964, p. 126).

[102] *Concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in retail trade*. Dated 15 October 1968, 1968 J.O.L/260, p. 1 (Sp. Edn., 1968, p. 496).

[103] Trade in tobacco and salt is traditionally a monopoly of the state in some member states of the EEC.

[104] *Laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in retail trade.* Dated 15 October 1968, 1968 J.O.L/260, p. 6 (Sp. Edn., 1968, p. 501).